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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

SUSAN ROE, et als.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

Page

Judgment Appealed From 1

Opinion Below 1

Jurisdiction 2

Statutes Involved 3

Question Presented by This Appeal 3

Statement of the Case 3

The Questions are Substantial 5

I. The Basis of the Lower Court Decision 5

II. Connecticut's Medicaid Program Does Not Discriminate Against Abortion 6

III. A State Is Not Required To Fund The Cost of the Exercise of a Constitutional Right 7

IV. Only a "Rational Basis" Need Exist For Connecticut's Medicaid Regulation Requiring That An Abortion Be Medically Necessary For The Patient's Health 11

Conclusion 17

Appendix

A. Memorandum of Decision 18

B. Judgment 26

C. Notice of Appeal 29

D. Section 275, Vol. III, Chap. III, Conn. Dept. of Social Services Public Assistance Program Manual 30

E. Excerpts from Answers to Interrogatories 33

F. Excerpts from Answers to Plaintiffs' Second Interrogatories to Defendants 35

G. Excerpt from Transcript of Oral Argument on Plaintiffs' Motion for Summary Judgment 38

H. Affidavit of Assistant Director, Health Services 39

TABLE OF CITATIONS

CASES CITED *Page*

American Federation of Labor v. Watson, 327 U.S. 582 .. 2

Boddie v. Connecticut, 401 U.S. 582 10

Commissioner of Social Services of State of New York v. Klein, 412 U.S. 925 5

Dandridge v. Williams, 397 U.S. 471 ..... 12, 13

Doe v. Beal, 523 F.2d 611 ..... 9, 12

Doe v. Bolton, 410 U.S. 179 5

Doe v. Myatt, Civ. No. A3-74-48 (D.N.D. 1975) 5

Doe v. Rampton, 366 F. Supp. 189 5

Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974) 5

Doe v. Westby, 383 F. Supp. 1143 (D.S.D. 1974) 5

Doe v. Wohlgemuth, 376 F. Supp. 173 ..... 9, 12

Dunn v. Blumstein, 405 U.S. 330 ..... 6, 11

Griffin v. Illinois, 351 U.S. 12 10

Helvering v. Davis, 301 U.S. 619 8

King v. Smith, 392 U.S. 309 2

Klein v. Nassau County Medical Center, 347 F. Supp. 496 . 5

Lindsley v. Carbonic Gas Co., 220 U.S. 61 13

McGowan v. Maryland, 366 U.S. 420 14

Memorial Hospital v. Maricopa County, 415 U.S. 250 6

Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 ... 13

Roe v. Wade, 410 U.S. 113 5

Rosado v. Wyman, 397 U.S. 397 14

Shapiro v. Thompson, 394 U.S. 618 ..... 6, 10

Sosna v. Iowa, 419 U.S. 393 6

Stanley v. Georgia, 394 U.S. 557 10

United States v. Georgia Public Service Commission, 371 U.S. 285 2

United States v. Butler, 297 U.S. 1 8

Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974) 5

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a three-judge United States District Court for the District of Connecticut, entered on January 16, 1975, declaring Section 275 of Volume 3, Chapter III, of the Connecticut Department of Social Services Public Assistance Program Manual, to be unconstitutional, and permanently enjoining its further enforcement, and submits this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is not yet reported. A copy of that opinion

is attached hereto as Appendix A. Earlier opinions in this same case are reported in 380 F.Supp. 726 (D. Conn. 1974) (in which a single-judge District Court considered the pendant statutory claim and ruled that the state regulation was "invalid as contrary to the Medicaid provisions of the Social Security Act); and in 522 F.2d 928 (2d Cir. 1975) (in which the Court of Appeals reversed and remanded for convening of a three-judge district court to consider the constitutional issues, one judge concurring in part and dissenting in part).

JURISDICTION

This action was brought by plaintiffs (appellees) under 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3) and 28 U.S.C. § 2281. In the hearing on remand from the Court of Appeals before a three-judge District Court, the plaintiffs were seeking injunctive relief restraining the appellant-state commissioner of social services from the enforcement, operation and execution of a regulation of statewide applicability on the ground of its unconstitutionality.

The three-judge District Court, after a hearing on plaintiffs' motion for summary judgment, entered judgment on January 16, 1976 (Attached hereto as Appendix B), and notice of appeal was filed in that court on February 13, 1976 (Attached as Appendix C).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Georgia Public Service Commission*, 371 U.S. 285;

American Federation of Labor v. *Watson*, 327 U.S. 582;

King v. *Smith*, 392 U.S. 309.

STATUTES INVOLVED

Section 275, Volume 3, Chapter III, Connecticut Department of Social Services, Public Assistance Program Manual, is the regulation whose validity is involved in this action and it is set forth in Appendix D which is attached hereto.

QUESTION PRESENTED

Under Connecticut's Title XIX Medical Assistance ("Medicaid") Program, payment for medical services to eligible recipients is limited to those which are medically necessary for the patient's health. Payment for an abortion under the program will be made if the recipient's attending physician will certify that the abortion is either medically or psychiatrically necessary for the patient's health. The attending physician's certification of medical necessity in such a case is never challenged.[1]

The question presented by this appeal is:

> Whether the failure of Connecticut's medical assistance program to also include a provision for payment of the cost of an abortion which is admittedly not necessary for the patient's physical or psychiatric health violates the plaintiffs' rights under the equal protection clause of the Fourteenth Amendment, or any other of plaintiffs' constitutionally protected rights.

STATEMENT OF THE CASE

This action was brought by two women who were eligible for and receiving medical benefits under Connecticut's "Medicaid" program. Plaintiff Roe had had an abortion in September,

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[1] "The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician." *Answer To Interrogatories*, question 6A, Appendix E, p. 33.

1973, for which the welfare department had refused to pay the hospital bill of $244.20. Plaintiff Roe was pregnant at the time the suit was brought and she obtained a temporary restraining order which prevented the defendant welfare department from refusing to pay under its Medicaid program the costs of her abortion.

Neither plaintiff submitted to the (then) welfare department the certification of her physician that the abortion was medically or psychiatrically necessary for the patient's health.

On the plaintiffs' motion for a summary judgment, a single-judge District Court found that the constitutional claim was sufficiently substantial to invoke the jurisdiction of the court and to justify consideration of the pendant statutory claim without convening a three-judge court pursuant to 28 U.S.C. § 2281.

The District Court thereupon, found that the defendant's regulation concerning abortion services was "invalid as contrary to the Medicaid provisions of the Social Security Act" and permanently enjoined its enforcement. *380 F.Supp.* 726, 730.

On appeal by the defendant, the U. S. Court of Appeals (2d Cir.) reversed the decision of the District Court, holding that "while Title XIX *permits* federal reimbursement for elective abortions, it does not *forbid* state regulations limiting Medicaid payments for abortions to those which are therapeutically necessary for the health of the pregnant woman." *522 F.2d* 928, 935, and remanded the case for the convening of a three-judge court to consider the constitutional issues pursuant to 28 U.S.C. § 2281.

The three-judge District Court, on remand, after oral argument on plaintiffs' motion for summary judgment, found that "those provisions of § 275 that require certification that

an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them."

THE QUESTIONS ARE SUBSTANTIAL

Several lower federal courts have held unconstitutional State Medicaid policies which imposed restrictions on payment for abortion under Title XIX Medicaid programs.[2] The Supreme Court had not as yet, however, ruled on the constitutionality of this issue. In this case, unlike others which have reached this Court, the statutory question was first decided by the District Court, subsequently reviewed by the Second Circuit, and thereafter remanded to a three-judge District Court which determined the constitutional issues.

I.

THE BASIS OF THE LOWER COURT DECISION

The reasons for the District Court's decision are contained, essentially, in the following portion of the Memorandum of Decision:

> "The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protec-

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[2] *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), cert. granted ____ U.S. ____ (1975); *Doe* v. *Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Myatt*, Civ. No. A3-74-48 (D.N.D. Jan. 27, 1975); *Doe* v. *Westby*, 383 F.Supp. 1143 (D.S.D. 1974), vacated and remanded for consideration of statutory grounds ____ U.S. ____, 43 L.Ed.2d 648 (1975); *Doe* v. *Rampton*, 366 F.Supp. 189 (D. Utah 1973); *Klein* v. *Nassau County Medical Center*, 347 F.Supp. 496 (E.D.N.Y. 1972), vacated and remanded for further consideration in light of *Roe* v. *Wade* and *Doe* v. *Bolton, Commissioner of Social Services of State of New York* v. *Klein*, 412 U.S. 925-26 (1973).

tion issue arises if the state refuses to reimburse expenses incurred in procuring an abortion. [footnote omitted]

"When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); cf. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972)."

Memorandum of Decision, (Appendix A, p. 18, at p. 20).

II.

CONNECTICUT'S MEDICAID PROGRAM DOES NOT DISCRIMINATE AGAINST ABORTION

Connecticut has limited the coverage under its Title XIX Medicaid program (as initially it believed was required by federal law), to providing payment thereunder for services which are medically necessary for the patient's health. But, even then, not all necessary medical services are provided for under Connecticut's program. Notable exclusions are many dental services such as periodontia and orthodontia.

Earlier in this litigation, on appeal from the single-judge district court, the Second Circuit held, in interpreting the federal statute (42 U.S.C. § 1396 *et seq.*) that, under Title XIX, a state *may* include payment for an elective abortion

under its Medicaid program but it is not *required* to do so. Connecticut, thereafter, elected *not* to include a provision for payment, under its program, for elective abortions, but to continue to pay thereunder for therapeutic abortions which were so certified by the patient's attending physician.

In arriving at its decision, the District Court has mistaken the focus of Connecticut's Medicaid program — that focus is neither upon pregnancy nor abortion. It is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. The court overlooked the fact that not only does the state's medical program exclude payment for elective abortions, it also excludes all other non-medically necessary medical care, including non-medically necessary prenatal or post-natal care. A State regulation which attempted to *exclude* from coverage under Medicaid an abortion which *was* medically necessary for the patient's health might well run afoul of the equal protection clause as an invidious discrimination. That is not the case here.[3] Connecticut makes no invidious discrimination against abortion under its Medicaid program.

III.

A STATE IS NOT REQUIRED TO FUND THE COST OF THE EXERCISE, BY AN INDIGENT, OF A CONSTITUTIONAL RIGHT

The District Court has held in its opinion that when the State fails to provide for payment of an elective abortion under its Medicaid program, while providing payment thereunder

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[3] From July 1, 1973 through June 16, 1974, payment was made for a total of 1,410 abortions under Connecticut's Title XIX program. *Answers To Plaintiffs' Second Interrogatories*, question 8, Appendix F, p. 36.

for a therapeutic abortion, as well as for prenatal and postnatal care, "it thus infringes upon a fundamental interest . . . and must assert a compelling state interest that justifies the incursion." (Appendix A, p. 20). Since it has previously been indicated that abortion is not singled out for treatment different from other medical services covered under the Connecticut's Medicaid program, this finding of the District Court is tantamount to a claim that if Connecticut chooses to provide its public funds (in conjunction with federal funds) to relieve one of the hardships caused by indigency (the lack of adequate medical care), it must also provide public funds to relieve other hardships caused by indigency, at least insofar as the exercise of a fundamental constitutional right is involved.

In *Helvering* v. *Davis,* 301 U.S. 619 (1937), the Supreme Court indicated that such a decision does not lie with the courts, when Justice Cardozo commented therein as follows:

"Congress may spend money in aid of the 'general welfare.' [citations omitted] There have been great statesmen in our history who have stood for other views.

We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra.* The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong,

a display of arbitrary power, not an exercise of judgment. This is now familiar law."

301 U.S. at 640.

In *Doe* v. *Wohlgemuth,* 376 F. Supp. 173 (1974), a three-judge district court held that a Pennsylvania Medicaid regulation, which also excluded payment for a non-therapeutic abortion, was unconstitutional.[4] But in that case even the majority opinion concluded by stating:

"We do not hold that the state must finance a fundamental right, but we do hold that the expression of that fundamental right cannot be the basis for invidious discrimination."

376 F.Supp. at 192.

In a dissenting opinion in that case, Judge Weis stated, *inter alia:*

". . . Thus the question here is not whether the state may prohibit certain categories of abortion. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the

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[4] Pennsylvania's Medical Assistance Program imposed much more extensive restrictions on payment for abortion than did Connecticut's program. Before payment would be made for an abortion, Pennsylvania required that (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat of the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. *Doe* v. *Beal,* 523, F.2d 611, 613, 614.

State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary and non-necessary abortions offend the Equal Protection Clause.

"That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin* v. *Illinois*, 351 U.S. 12 . . . (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie* v. *Connecticut*, 401 U.S. 371 . . . (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. . . .

". . .[A] scrutiny of representative Supreme Court determinations on the 'fundamental' right classification, including those in the right to privacy category, demonstrates no corollary of required State subsidy.

"While *Shapiro* v. *Thompson*, 394 U.S. 618 . . . [footnote omitted] found the right to travel among states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

"While a person may have a fundamental right of privacy to have obscene material in his home, *Stanley* v. *Georgia*, 394 U.S. 557, . . . (1969) . . . there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to

purchase public address systems or printing presses for those unable to pay for them."

376 F.Supp. at 193-194.

It is submitted that the prior decisions of this Court do not support the proposition that a State is required to fund, for an indigent person, the exercise of a constitutional right. The reasoning of the District Court in this respect is contrary to the weight of constitutional authority.

IV.

ONLY A "RATIONAL BASIS" NEED EXIST FOR CONNECTICUT'S MEDICAID REGULATION REQUIRING THAT AN ABORTION BE MEDICALLY NECESSARY FOR THE PATIENT'S HEALTH

The District Court in this case has held that since, in its view, the State's Medicaid regulation regarding payment for abortion interferes with the exercise of a fundamental right, Connecticut must demonstrate that there is a compelling state interest which is being served for the regulation withstand judicial scrutiny, citing *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972).

But if, as the appellant has claimed herein, *supra*, abortion is not the subject of invidious discrimination under Connecticut's medical program; and, if, as is also contended, a State is not required to fund the exercise of an indigent's constitutional right, then there is no interference by the defendant with plaintiffs' fundamental right to have an abortion. The issue involved is, instead, the plaintiffs' right to receive medical welfare benefits. That right has never been held to be a fundamental one. In determining whether there is a violation of the Equal Protection Clause in such a case, Connecticut's

regulation is subject only to the "rational basis" test set forth in *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

In *Doe* v. *Beal*, 523 F.2d 611 (1975), the Third Circuit, sitting *en banc*, held that Pennsylvania's Medical Assistance Program regulations and procedures, as they apply to reimbursement for abortions were invalid because they were inconsistent with Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. It was therefore unnecessary for that court to reach the constitutional issues. However, in a dissenting opinion in that case, Judge Kalodner (with Judge Adams concurring therein) did comment on the holding of the district court which held that the Pennsylvania regulations were "unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between invidual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." *Doe* v. *Wohlgemuth*, 376 F.Supp. at 191.

The lower court in that case had held that Pennsylvania must show a compelling reason for limiting payment for abortion under its Medical Assistance Program to situations requiring necessary medical care. In his dissent, Judge Kalodner stated *inter alia:*

> "The cornerstone of the plaintiffs' contention is that the Regulations, in the *absence of a compelling state interest*, violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes* — one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.
>
> "The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program has commited itself to extend medical care to its eligibles only where *'necessary medical care' is required.*

The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the 'compelling state interest' test. It is subject only to the 'reasonable basis', otherwise stated, 'rational basis' test, spelled out in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970). There, the Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485, 90 S.Ct. at page 1161:

> 'In the area of economics and *social welfare*, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification* 'is not made with mathematical nicety or because in practice it *results* in *some inequality.' Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 55 L.Ed. 369]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 [33 S.Ct. 441, 57 L.Ed. 730]' (emphasis supplied).

"I am of the opinion that the classification between 'necessary medical care' and 'non-necessary medical care' survives the application of the 'reasonable basis' and/or 'rational basis' tests."

523 F.2d, at 633.

Appellant submits that, in determining whether plaintiffs had been denied equal protection, it was error for the District

Court to apply the "compelling state interest" test to Connecticut's Medicaid regulation. Prior decisions of this Court indicate that in the area of economics and social welfare the appropriate test to be applied is the "rational basis" test of *Dandridge, supra,* under which:

> ". . . '[A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U.S. 420, 426 . . ."

397 U.S. at 485.

Applying this test to the instant case, Sec. 275 of Connecticut's Medicaid regulation easily meets the test prescribed by *Dandridge.*

But even if, as the district court has held, Connecticut must show a compelling interest in order to limit the scope of its Medicaid program to those services which are medically necessary for the patient's health, it is submitted that such a compelling interest is present in this case. That interest is not the one as to which the district court speculated in its decision, namely, that "The only other possible state interest would be that of avoiding the expenditure of public funds for a purpose the state finds morally objectionable."[5]

In Connecticut, as in perhaps most other states, the Title XIX Medicaid program is the single most costly of the State's public assistance programs, easily surpassing in expenditure even the AFDC program. At a time when Connecticut is

[5] In *Rosado* v. *Wyman,* 397 U.S. 397, Justice Harlam stated, *inter alia*:

> "We reach our conclusions without relying on the finding made by the court below that in § 131-a New York was *attempting* to constrict its welfare payments. Speculation as to legislative and executive motive is to be shunned. . . ." [emphasis in original]

397 U.S. 419.

undergoing a severe fiscal crisis, the need of the State to limit the scope of its medical program and the expenditures thereunder is certainly a compelling state interest. Not merely the increased cost of non-medically necessary abortions is involved, (as the District Court seemed to believe) but the cost of payment for all other recognized medical procedures is involved, whether they be medically necessary or not, since, if non-medically necessary abortions must be included in the program, how can these other medical services be excluded. This is certainly a compelling state interest which justifies limiting the scope of Connecticut's medical assistance program.

Appellant is also appealing from the district court's decision which invalidated the "prior approval" requirement of Section 275 of Connecticut's Medicaid regulation, believing it was error to decide this issue on a motion for summary judgment since on this question there was a disputed issue of fact.

There was no *competent* evidence introduced to support the district court's finding that "The prior approval procedure creates the sort of delay that the Supreme Court found constitutionally repugnant in *Doe* v. *Bolton.*" (*Memorandum of Decision,* Appendix A, p. 20, at p. 23).

Defendants had submitted a counteraffidavit[6] in reply to plaintiffs' motion for summary judgment indicating that in critical situations it was possible for a physician to obtain approval from the department by telephone, to be followed later by the necessary paper work. Defendants had also submitted a motion to strike the affidavits submitted with plaintiffs' motion for summary judgment because defendants had been deprived of their right to cross examination. The district court indicated it would reserve decision on this motion and rule

[6] See Appendix H, p. 39.

upon it "at the same time we rule on the summary judgment motion." (See Appendix G, p. 38, Excerpt from Transcript of Oral Argument on Motion for Summary Judgment). The lower court, however, failed to rule on this motion.

The defendants had also indicated that the average time lapse between receipt of a request for prior approval in the office of the welfare department to the time approval was mailed out to the initiating party was approximately three days.[7] However, it would serve no purpose to discuss this question further at this stage of the proceedings.

[7] Appendix E, *Answers To Interrogatories*, question 4, p. 33.

CONCLUSION

There are at least two reasons why the question presented by this appeal is sufficiently substantial as to require plenary consideration:

1) the resolution of the question of whether a State's Medicaid program must provide for payment of the cost of a non-therapeutic abortion will have immediate importance far beyond the particular facts and parties involved in this case;

2) the three-judge District Court has decided a question of federal law which has not previously, but should be, settled by this Court.

Respectfully submitted,

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APPENDIX A

United States District Court

District of Connecticut

Civil No. N-74-17

SUSAN ROE, individually and on behalf of all others similarly situated, ET AL

v.

NICHOLAS NORTON, individually and as Commissioner of Welfare for the State of Connecticut, ET AL

Before: TIMBERS, *Circuit Judge*, ZAMPANO and NEWMAN, *District Judges.*

MEMORANDUM OF DECISION

NEWMAN, *District Judge:*

This is a motion for summary judgment by the plaintiffs in a lawsuit challenging the constitutionality of the Connecticut Department of Welfare's refusal to reimburse welfare recipients for the expense of an abortion, absent a prior showing that the abortion is necessary to preserve the physical or psychiatric health of the woman. The state originally defended its policy on the ground that Title XIX (Medicaid) of the Federal Social Security Act, 42 U.S.C. § 1396 *et seq.*, prohibited payment for elective abortions. A one-judge District Court rejected that contention, construing Title XIX neither to prohibit such payments nor to permit a state to refuse making them, 380 F.Supp. 726 (D. Conn. 1974). On appeal, the Second Circuit, No. 74-1874 (2d Cir. July 31, 1975), held that the Social Security Act was entirely neutral as to abortion payments, neither requiring the states to pay for any abortion services at all, nor forbidding the states from reimbursing welfare

recipients for the expense of an elective abortion. The case was remanded for consideration of the constitutional issues by this three-judge court, in the event the state chose to continue its policy once the mistaken reliance on Title XIX was removed. The state has elected to keep its policy in force.

Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, Ch. III, § 275 requires, prior to the performance of a first-trimester abortion for which welfare assistance is sought, that a certificate be submitted from the attending physician that the abortion is "recommended as medically or psychiatrically necessary."[1] The plaintiffs and the class they represent,[2] claim that this regulation is invalid because it denies them equal protection of the law.

Every plaintiff in this lawsuit is a potential medicaid recipient whose pregnancy was terminated during the first trimester of pregnancy and who elected to undergo an abortion for reasons unrelated to preservation of the mother's health. Plaintiff Susan Roe was pregnant when this action was commenced, and her physician did not believe that her health would be jeopardiped if she carried the pregnancy through to term. Therefore he did not submit an attestation of medical necessity for the abortion that Ms. Roe wished to have performed. Plaintiff Roe underwent an abortion for which the State Welfare Department refused to authorize medicaid payment because no prior approval based upon the medical necessity standard had been obtained. Subsequent to the Court of Appeals remand, the District Court issued temporary restraining orders enjoining the defendants from refusing to reimburse three additional women for the costs of their elective abortions.

In *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Supreme Court held that encompassed within a woman's constitutional right of personal privacy is

the unfettered right to terminate a pregnancy through an abortion performed by a licensed physician during the first trimester of pregnancy. Before the end of approximately twelve weeks of pregnancy, the state may not interfere in any manner with the performance of an abortion. See *Abele* v. *Markle*, 369 F.Supp. 807 (D. Conn. 1973).

That a constitutional right to an abortion exists does not necessarily mean that there is a constitutional right to a *free* abortion, with the state obligated to absorb the cost of the medical procedure. *Cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971). As the defendants point out, in *Dandridge* v. *Williams*, 397 U.S. 471 (1970), the Supreme Court declined to hold that welfare assistance is a fundamental right. The present case is not controlled by the rationale or the result in *Dandridge*, however, because in *Dandridge* the state was asked to allocate additional funds solely to avoid decreasing the average AFDC grant per member of a dependent family. In *Dandridge* the state's fiscal policy had no direct effect whatsoever upon the exercise of a constitutionally protected right.

The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion.[3]

When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *cf. Sosna* v. *Iowa*, 419 U.S. 393 (1975). Her choice is

affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-42 (1972).

The state's initial position in this litigation was that it failed to reimburse elective abortions solely because it believed that federal law prohibited such payments. *Roe* v. *Norton*, *supra*, 380 F.Supp. at 728. Now the state asserts that it has a fiscal interest in refusing to fund elective abortions for welfare recipients. This interest is wholly chimerical because abortion is the least expensive medical response to a pregnancy.[4] An abortion normally requires two expenditures of funds: a consultation to determine that an abortion is medically safe, and the medical procedure itself. By contrast, in the event of childbirth, the state pays the more extensive costs of prenatal, obstetrical, and postpartum care, as well as prenatal support for the unborn child. *Klein* v. *Nassau County Medical Center*, 347 F.Supp. 496, 500 (E.D.N.Y. 1972) (three-judge court), *remanded* in light of *Wade* and *Bolton*, 412 U.S. 925 (1973). Furthermore, the birth of a child to a welfare mother increases the burden on the state's welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance.[5] The state's assertion that it saves money when it declines to pay the cost of a welfare mother's abortion is simply contrary to undisputed facts.

The only other possible state interest would be that of avoiding the expenditure of public funds for a purpose the state finds morally objectionable. The Supreme Court in *Roe* v. *Wade* acknowledged that abortion is a sensitive issue, but nevertheless announced the principle that a woman has a constitutional right to have an abortion, at least during the first trimester of pregnancy. The state may not justify its refusal

to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right. See *Doe* v. *Rose*, 499 F.2d 1112, 1117 (10th Cir. 1974). The state's unarticulated position on the morality of abortion cannot be considered a compelling state interest that will justify the weighing of a choice against the exercise of a constitutional right. See *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534-35 and n.7 (1973).

The state has advanced no interest in not paying for elective abortions that would satisfy the compelling state interest test — nor even one that would satisfy the less rigorous rational relationship test. Accordingly, that portion of § 275 which requires that an abortion be medically necessary is unconstitutional and may not be enforced by the state. *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3674 (June 23, 1975); *Doe* v. *Rose*, *supra*; *Doe* v. *Myatt*, No. A3-74-48 (D.N.D. Oct. 30, 1975) (three-judge court); *Doe* v. *Wohlgemuth*, 376 F.Supp. 173 (W.D. Pa. 1973) (three-judge court), *aff'd on other grounds sub nom. Doe* v. *Beal*, Nos. 74-1726 and 74-1727 (3d Cir. July 21, 1975).

The state has expressed the concern that invalidation of its policy on abortion payments will obligate it to pay for all elective procedures, such as cosmetic surgery and orthodonture. The fear is groundless. In declining to pay for these procedures, the state is not discouraging the exercise of any constitutional right.

The validity of the prior approval procedure during the first trimester of pregnancy is also before this Court.[6] The defendants, other than noting that there are other forms of medical care that require prior authorization before a medicaid claim will be honored, have asserted no interest justifying the prior authorization procedure for abortions. The state does not require prior approval for reimbursement for expenses arising out of childbirth. It has asserted no justification for requiring a different procedure when dealing with an abortion performed during the first trimester of pregnancy. Plaintiffs have submitted the affidavits of physicians who maintain that any delay in the performance of an abortion adds to the medical danger faced by the pregnant woman. The prior approval procedure creates the sort of delay that the Supreme Court found constitutionally repugnant in *Doe* v. *Bolton, supra*. Thus the state may not require the prior approval form to be submitted before an abortion is performed, and may not rely on the lack of such prior approval for failure to reimburse the expenses of the abortion. *Doe* v. *Bolton, supra; Word* v. *Poelker*, 495 F.2d 1349, 1351-52 (8th Cir. 1974); *Wulff* v. *Singleton, supra*, at 1215. Similarly, § 275's requirement that evidence of the patient's consent be presented to the state prior to a first-trimester abortion furthers no legitimate state interest that justifies the distinction between abortions and other medical responses to pregnancy.[7] This provision also contravenes the Equal Protection Clause. See *Wolfe* v. *Schroering*, 388 F.Supp. 631, 636 (W.D. Ky. 1974).

No state regulation of medicaid payments for abortions performed in the first trimester of pregnancy can impose conditions or requirements that are not equally applicable to medicaid payments for childbirth, if such conditions or requirements tend to discourage a woman from choosing an abortion or to delay the occurrence of an abortion that she has asked her physician to perform. Accordingly, those provisions of § 275 that require certification that an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them. Further, the defendants are enjoined from requiring, prior to the performance of an abortion, any form of approval as a condition for the

reimbursement of the expenses of an abortion performed during the first trimester of pregnancy.

Dated at New Haven, Connecticut, this 31st day of December, 1975.

.....

WILLIAM H. TIMBERS
United States Circuit Judge

.....

ROBERT C. ZAMPANO
United States District Judge

.....

JON O. NEWMAN
United States District Judge

FOOTNOTES

[1] Section 275 provides in relevant part:

> Therapeutic abortion services within the State are covered under Title XIX when all the following conditions are met:
>
> 1. The abortion is recommended as medically necessary by the attending physician in an accredited hospital or licensed clinic. . . .
> 2. The written consent for the abortion is secured from the patient. . . .
> 3. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

[2] The District Court certified the lawsuit as a class action under Fed. R. Civ. P. 23(b)(2). 380 F.Supp. at 730.

[3] The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions in *Roe* and *Doe*. *See Roe* v. *Wade*, *supra*, at 129-147, 148-50, and 170 (Stewart, J. concurring); *Doe* v. *Bolton*, *supra*, at 218-20 (Douglas, J. concurring); *Doe* v. *Beal*, Nos. 74-1726 and 74-1727 (3rd Cir. July 21, 1975) at 19; *Wolfe* v. *Schroering*, 388 F.Supp. 631, 637 (W.D. Ky. 1974); *but cf. Roe* v. *Norton*, No. 74-1874, *supra*, at 5317-18 (Mulligan, J., concurring and dissenting).

[4] Abortion has been recognized as both an inexpensive and safe alternative to pregnancy in several recent decisions. *E.g.*, *Doe* v. *Beal*, *supra*, at 19; *see Roe* v. *Wade*, *supra*, at 149-50 and n.44.

[5] *Dandridge* v. *Williams*, *supra*, is a stark example of the burdens that the state's treasury must carry, and the hard choices the state must make, when additional children are born to a family that is already receiving welfare assistance.

[6] The procedures established by the State Welfare Department pertaining to reimbursement for an abortion performed during the second trimester of pregnancy are not before the Court. No plaintiff in this action had an abortion performed or sought permission for the performance of an abortion later than the first trimester of pregnancy. Accordingly, they have no standing to challenge the procedures established by the state with regard to the second trimester of pregnancy. *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972).

[7] Whatever power the state may have to assure itself that public funds are not used for an abortion unless the woman's consent is established can be exercised by requiring, prior to actual reimbursement, presentation of evidence of consent that was obtained from the woman prior to the abortion. Requiring presentation of evidence of consent at that time does not delay the abortion nor otherwise impair any right of the woman.

APPENDIX B

United States District Court

District of Connecticut

Civil No. N 74-17

SUSAN ROE, individually and on behalf of all others similarly situated, et al

v.

EDWARD MAHER, individually and as Commissioner of Social Services for the State of Connecticut, et al.

SUMMARY JUDGMENT AND ORDER

This cause having come on for consideration on plaintiffs' motion for summary judgment and the Court having rendered its Memorandum of Decision on plaintiffs' motion for summary judgment, under date of December 31, 1975, granting said motion,

It is hereby ORDERED and ADJUDGED as follows:

1. This action shall be maintained as a class action under Fed. R. Civ. P. § 23(b)(2);

2. Judgment be and is hereby entered in favor of the plaintiffs and the class they represent, declaring that Connecticut Welfare Department, Public Assistance Manual, Vol. 3, Ch. III, § 275 is invalid as contrary to the United States Constitution, insofar as it requires certification that an abortion is medically or psychiatrically necessary, and insofar as it requires, prior to the performance of an abortion, any form of approval or consent or any other condition or requirement for the reimbursement of the expenses of an abortion performed during the first trimester of pregnancy.

3. Defendants, their agents and employees, are hereby enjoined from requiring as a condition for the reimbursement by Medicaid of the expenses of an abortion performed during the first trimester of pregnancy:

a) the existence of medical or psychiatric necessity, or any statement or certification that the abortion is medically or psychiatrically necessary;

b) prior approval of or prior authorization or any other form of approval for the abortion by the defendants, their agents or employees, or any person.

c) receipt of evidence of the patient's consent by defendants, their agents or employees prior to the performance of a first-trimester abortion;

d) any other condition or requirement for reimbursement for abortion services which is not equally applicable to payment and/or reimbursement for childbirth and other forms of obstetrical care, if such conditions or restrictions tend to discourage a woman from choosing an abortion or to delay the performance of an abortion that she has asked her physician to perform.

4. Defendants are hereby ordered to notify in writing within two weeks of the date hereof all persons eligible for Medicaid, or medical assistance, from the State of Connecticut, that abortion is a physician's service now eligible for Medicaid reimbursement and that no proof of medical necessity, prior authorization or other condition or requirement is necessary to receive such reimbursement. Such notice shall be printed in both English and Spanish.

5. Nothing contained hereby shall be interpreted to preclude the defendant Commissioner of Social Services from

imposing reasonable regulations upon abortions performed beyond the first trimester.

The parties have consented to the form of this judgment.

Dated at New Haven, Connecticut, this 16th day of January, 1976.

.....

SYLVESTER J. MARKOWSKI
Clerk, United States District Court

Judgment may enter.

.....

JON O. NEWMAN
United States District Judge

APPENDIX C

United States District Court

District of Connecticut

Civil No. N-74-17

FEBRUARY 11, 1976

SUSAN ROE, ET AL.
Plaintiffs

v.

EDWARD W. MAHER, Individually and as Commissioner of Social Services of the State of Connecticut
Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Edward W. Maher, Commissioner of Social Services of the State of Connecticut, the defendant above named hereby appeals to the Supreme Court of the United States from the permanent injunction enjoining the defendant from further enforcing Index (Section) 275 of the Connecticut Department of Social Services Policy Manual entered in this action on the 16th day of January, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

.....

EDMUND C. WALSH
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114
Tel.: 566-7014

Attorney for the Defendant

APPENDIX D

Connecticut State Department of Social Services
Medical Assistance Program

Manual Vol. 3 — Chapter III

MEDICAL SERVICES

275 *Abortion Services*

The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.

2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. If the patient is *beyond* the first trimester of pregnancy, the abortion must be perfomed in an accredited hospital and the Chief of Obstetrics and Gynecology certifies in writing that the attending physician has hospital privileges and the abortion will be performed in that hospital.

3. The written request for the abortion is submitted by the patient, and in the case of a minor, from the parent or guardian.

In the case of a committed child, a written consent for the abortion is secured from the Commissioner of the Department of Children and Youth Services as guardian.

4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

Procedures

1. The hospital in which the requested abortion it to be performed, or the clinic which is licensed to perform abortions during the first trimester of pregnancy will submit Form W-217, "Letter Requesting Certification for Reimbursement Abortion", to Health Services in Central Office in which the attending physician certifies that the patient, parent or guardian has requested the performance of an abortion. This is signed by the attending physician in the accredited hospital or licensed clinic when the abortion is performed during the first trimester.

When the abortion is to be performed *beyond* the first trimester of pregnancy, the Form W-217a is completed by both the attending physician and the Chief of Obstetrics and Gynecology. The Chief of Obstetrics and Gynecology certifies that the attending physician has hospital privileges and that the abortion will be performed in that hospital.

2. In addition, Form W-601, "Request for Authorization for Professional Services" must accompany Form W-217 or Form W-217a and should include a statement indicating the medical need for the abortion.

For PA recipients and recipients of services from Unmarried Mothers program, the request will be reviewed by competent medical authority in the Division of Health Services in Central Office, and the hospital or clinic will be notified of the Department's decision by returning two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files.

For Committed Children, completed Forms W-601, 217 and 217a together with Social Data prepared by the D.C.Y.S. Regional Office are submitted to the Department of Children and Youth Services Central Office. Social Data includes all

pertinent background information regarding race, age of the individual, commitment date, the current situation and the individual's wishes and the specific medical necessity.

The packet will then be referred to the Division of Health Services for medical review and recommendation.

After review and recommendation by the Division of Health Services, the complete packet (Forms W-601, W-217 or W-217a and Social Data) will be returned to the Commissioner of Children and Youth Services for his review, decision and signing of the anesthesia permit if he consents to the abortion. If consent is given, Forms W-601, W-217 and W-217a are then returned to the Division of Health Services.

The hospital or licensed clinic is then notified by the Division of Health Services of the Department's decision by forwarding two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files. The Department of Children and Youth Services makes necessary arrangements for the individual's admission to the hospital.

Revised 9-15-75

APPENDIX E

EXCERPTS FROM ANSWERS TO INTERROGATORIES

• • •

4. *QUESTION:* What is the average time lapse between receipt of a request for prior approval in the office of the State Welfare Commissioner and the return of said receipt to the applicant?

ANSWER: Approximately three days from the time of receipt of request until the time it is mailed out to initiating party. (Hospital)

• • •

6A. *QUESTION:* Define the phrase "medically necessary for the patient's health".

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

• • •

7A. *QUESTION:* Define and describe by example every medical circumstance which is included in the category of "'medically necessary for the patient's health" with respect to abortion.

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

7B. *QUESTION:* Define and describe by example every medical circumstance included in the category of "'not medically necessary for the patient's health".

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

• • •

Dated at Hartford, Connecticut, this 21st day of April, 1974.

NICHOLAS A. NORTON
Commissioner of Welfare
State of Connecticut

BY: .....
HAROLD MCINTOSH, *Assistant Director of Health Service*
Connecticut State Welfare Dept.

APPENDIX F

EXCERPTS FROM ANSWERS TO PLAINTIFFS' SECOND INTERROGATORIES TO DEFENDANTS

• • •

2b. QUESTION: List and describe any and all differences between this regulation and defendants regulations regarding abortion as of January 22, 1974.

ANSWER: The August 26, 1975, revision differs from the policy as of January 22, 1974, in the following respects:

1) The Chief of Obstetrics/Gynecology is no longer required to sign the attending physician's certificate of medical necessity;

2) The latter revision, unlike the policy in effect in January, 1974, distinguishes between an abortion being sought in the first trimester of the pregnancy, and an abortion to be performed beyond the first trimester.

Form W-217 (Appendix D) is used for first trimester abortions. It contains only the certification of medical necessity to be signed by the attending physician.

Form W-217a (Appendix E) is used for abortions which have progressed beyond the first trimester of pregnancy. In addition to the attending physician's certificate contained on Form W-217, Form W-217a also contains a certification by the Chief of Obstetrics and Gynecology that the attending physician has hospital privileges at the indicated hospital, and that the abortion will be performed in that hospital.

3a. QUESTION: Define the following phrases as used in said amended § 275:

"medically necessary"
"therapeutic abortion services"

ANSWER: The Department of Social Services makes no attempt to define the term "medically necessary." This is a matter left entirely to the medical judgment of the patient's own attending physician.

The term "therapeutic abortion services" is defined in Index 275 of the policy manual as an abortion service covered under Title XIX when "[T]he abortion is recommended as medically necessary by the atending physician . . ."

3b. QUESTION: Define the phrase "medically necessary for the patient's health" as used in forms W-217 and W-217a;

ANSWER: See Answer to Question 3a.

• • •

7. QUESTION: From August 26, 1975, to the date of these Interrogatories, how many requests for reimbursement for abortion have been refused by any of the defendants, their agents or employees? What was the reason for such refusal?

ANSWER: Since August 26, 1975, to October 20, 1975, two hundred forty-one (241) requests for payment for abortions under the Title XIX Program have been approved; five (5) requests have been rejected because Form 601 and/or Form W-217 had not been completed.

8. QUESTION: During the period June 23, 1975, to August 26, 1975, how many abortions were reimbursed by the medical assistance program and at what cost to the state?

ANSWER: For the period from July 1, 1973, thru June 16, 1974, payment was made for a total of one thousand four hundred and ten (1,410) abortions under the Title XIX program. After the U.S. District Court entered an order, on June 16, 1974, enjoining the enforcement of Index 275 of the defendant's Policy Manual, the Department no longer maintained a

record of the number of abortions paid for under Title XIX. It would be possible to retrieve this information from the department's computer, but it would require the writing of a special program — a burdensome task to impose on a Department which is experiencing a continually increasing workload.

• • •

Dated at Hartford, Connecticut, this 21st day of October, 1975.

EDWARD W. MAHER
Commissioner of Social Services

BY: .....
HAROLD V. MCINTOSH
Assistant Director, Health Services

APPENDIX G

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

• • •

MR. WALSH: . . . I have an addition, if Your Honor please, a motion to strike the affidavits submitted by the plaintiffs with their motion for summary judgment. I don't object to the affidavits in the courts evaluating the summary judgment issue of whether or not there is a legal issue but I do think they are inadmissible for purposes of determination on the merits.

JUDGE TIMBERS: The Court has decided, Mr. Walsh, as a matter of procedure to reserve decision on your motion to strike. We will rule on that at the same time we rule on the summary judgment motion. I think we have your position well in mind set forth in the papers.

MR. WALSH: Thank you.

JUDGE TIMBERS: Anything further?

• • •

APPENDIX H

AFFIDAVIT

My name is Harold V. McIntosh, and I am employed by the Department of Social Services, State of Connecticut at 110 Bartholomew Avenue, Hartford, Connecticut, as Assistant Director of Health Services. In that capacity I am intimately familiar with the operation of the Department's operation of its Title XIX Medicaid Program, and also with the requirements for payment for abortion thereunder, when such an abortion is required for the patient's health.

I have read the Plaintiffs' Memorandum of Law In Support of Motion for Summary Judgment in this case and I make the following statements in response thereto:

1). I know of no instance where a woman, eligible under the Program, was deprived of a medically necessary abortion operation, so certified by her physician, because of an undue delay in the processing of her application. When the department is notified by telephone by an attending physician that he believes that any delay in performing the abortion operation would pose an increased risk to the patient's health, the Department of Social Services will give oral approval to that physician immediately, by telephone, of the patient's application, on condition that the physician will state that he has signed the certificate of medical necessity and will forward it to the department;

2). Contrary to the assertions contained in the Plaintiffs' Memorandum of Law, abortions which are required for the patient's health are not singled out from all other

services by requiring prior approval therefor. There are a great many services provided under the Medicaid services which require prior approval from the Department;

3). Despite language contained in the Department's current policy on abortions which plaintiffs' have interpreted otherwise, the Department of Social Services *accepts at face value* the certification of medical necessity of the patient's attending physician.

There is no "second-guessing" of the attending physician's certification, nor is there any "review" of his medical judgment. This has been the practice of the Department, for at least since June, 1974 when the U.S. District Court enjoined enforcement of the Department's requirement that an abortion be certified as necessary for the health of the patient;

4). The Medicaid program in Connecticut provides only for necessary medical services, except where federal law mandates that certain other services be provided, as, for example, family planning services and services for persons under 21 years of age under the Early Periodic Screening, Detection and Treatment Program (EPSDT). But even where services are medically necessary, there are exclusions and limitations upon some services even though they are medically necessary.

5). From August 26, 1975 when the Department re-instated, after the decision of the U.S. Court of Appeals, its policy of requiring a certificate of medical necessity from the patient's physician before an abortion would be paid for under the Program, a total of 241 medically necessary

abortions have been approved for payment under the State's Title XIX program, and five (5) have been disapproved for failure to comply with the Department's policy.

Dated at Hartford, Connecticut this 22nd day of October, 1975.

HAROLD V. MCINTOSH
Assistant Director, Health Services
Connecticut Department of Social Services

Supreme Ct, U. S.
FILED
AUG 25 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT,

Appellant,

v.

SUSAN ROE, ET AL.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

FILED APRIL 9, 1976

PROBABLE JURISDICTION NOTED JULY 6, 1976

INDEX

(NOTE: The judgment and the opinion below are contained in the jurisdictional statement beginning at pages 26 and 18 respectively. The opinion below has now been reported in 408 F.Supp. 660 (1975)).

Page

1. Relevant docket entries 1

2. Connecticut State Welfare Department Manual, Volume 3, Chapter III, Section 275, on Abortion Services 7

3. Excerpts from Answers to Interrogatories 10

4. Excerpts from Answers to Plaintiffs' Second Interrogatories to Defendants 12

5. Defendant's Motion to Strike Affidavits 15

6. Excerpt from Transcript of Oral Argument on Plaintiffs' Motion for Summary Judgment 16

7. Affidavit of Assistant Director, Health Services 17

8. Affidavit of Susan Roe in Support of Motion for Temporary Restraining Order 20

9. Affidavit of James Kauders, M.D. in Support of Motion for Temporary Restraining Order 22

10. Affidavit of Linda Poe in Support of Motion for Temporary Restraining Order 24

11. Affidavit of Barbara Bye 26

12. Affidavit of James Kauders, M.D. 28

13. Affidavit of Carol C. 30

14. Affidavit of Eugene Corley, M.D. 32

15. Affidavit of Debbie D. 34

16. Affidavit of Joseph Horowitz, M.D. 36

17. Affidavit of Sandra Sereque in Support of Motion for Summary Judgment 39

18. Connecticut Law Journal, September 16, 1975 41

19. Affidavit of Sandra Sereque 44

20. Connecticut Department of Social Services, Form W-601 45

21. Form W-285 46

22. Form W-217 47

23. Form W-217-a 48

24. Affidavit of Linda Poe, filed October 21, 1975 49

25. Affidavit of Barbara Bye, filed October 21, 1975 51

26. Affidavit of Carol C., filed October 21, 1975 53

27. Affidavit of Debbie D., filed October 21, 1975 54

28. Affidavit of Joseph Horowitz, M.D., filed October 21, 1975 56

29. Affidavit of Eugene Corley, M.D. filed October 21, 1975 60

30. Affidavit of Gordon Jonas, M.D., filed October 21, 1975 63

31. Affidavit of Harriet Bograd, filed October 21, 1975 ... 66

32. Affidavit of Patricia Tunstall, filed October 21, 1975 68

33. Affidavit of Mary Hennessy, filed October 21, 1975 .. 69

34. Affidavit of Betty Carrion, filed October 21, 1975 ... 71

35. Excerpt from Memorandum for the United States as *Amicus Curiae*, pp. 9, 10 (submitted at request of the U.S. Court of Appeals (2d Cir.) in *Roe* v. *Norton*, 522 F.2d 928, filed on or about February 1, 1975) 72

1.

RELEVANT DOCKET ENTRIES

Roe v. Norton

JUDGE JON O. NEWMAN

United States District Court

1-22-74

Complaint, Motion for Permission to Proceed in Forma Pauperis and order thereon granting same (Newman, J.), Affidavits, Motion for Temporary Restraining Order, Class Action and Convening Three-Judge Court and Affidavits in Support of Motion, Notice of Motion, Memorandum of Law in Support of Motion for Temporary Order and Class Action, Affidavits of Anonymity, and Motion for Appointment of Person to Serve Process (Julian Nesta) and Order thereon (Markowski, C.), filed and entered this date. Summons issued and together with copies of same and of above papers filed and entered, handed to Attorney Katz. M-1-23-74.

1-25-74

Stipulation of parties that temporary restraining order enter granting relief requested by Plaintiff Susan Roe.

1-25-74

Temporary Restraining Order entered that pending hearing and determination by a statutory three-judge court of the constitutionality of the medical assistance regulations regarding abortions, defendants are restrained (a) from refusing to pay the full, reasonable cost of abortion services prescribed by a qualified physician and provided to plaintiff, Susan Roe; and (b) requiring prior approval, certification of medical necessity, or the fulfillment of any other condition before authorizing payment for said abortion services. Newman, J. M-1-25-74. Copies mailed.

2-11-74

Plaintiff's Interrogatories to be Answered under oath by the defendants pursuant to Rule 33 F.R.C.P. and Request to Produce Documents pursuant to Rule 34 F.R.C.P. filed.

2-13-74

Defendant's Answer to Complaint filed.

4-19-74

Motion for Summary Judgment and Affidavits in Support of Motion for Summary Judgment filed by plaintiff, and Notice of Motion, filed.

5-6-74

Answer to Interrogatories, filed by defendant, Nicholas A. Norton.

5-17-74

Hearing on Plaintiff's Motion for Summary Judgment. Plaintiff moves to amend Temporary Restraining Order to include the class. Court grants T.R.O. form of Order to be submitted this P.M. Decision Reserved on Motion for Summary Judgment. Newman, J. (T.R.O. entered on previous page)

6-12-74

Memorandum of Decision on Plaintiffs' Motion for Summary Judgment entered. Plaintiff Roe and the class she represents, FRCP (23) (b) (2) are entitled to a judgment declaring that Section 275 concerning abortion services is invalid as contrary to the Medicaid provisions of the Social Security Act, and enjoining defendants from enforcing it. This does not mean that the subject of Medicaid payments for abortions is insulated from all state regulation. (See Memo for further details). Newman, J. M-6-12-74 Copies mailed.

6-17-74

Summary Judgment entered in favor of the plaintiff and the class she represents declaring that Connecticut Welfare

Department Public Assistance Program Manual, Vol. 3, Ch. III, section 275, concerning abortion services is invalid as contrary to the Medicaid Provisions of the Social Security Act and defendants, their agents, employees and all persons in active concert or participation with them, are hereby enjoined from enforcing said section 275. Markowski, C. Approved, Newman, J. M-6-17-74. Copies mailed.

6-19-74

Notice of Appeal filed by defendant. Copies mailed to all counsel and to Clerk, U.S. Court of Appeals.

7-5-74

Civil Appeal Scheduling Order of the U.S. Court of Appeals, filed.

7-19-74

Record on Appeal sent U. S. Court of Appeals. Copies of docket entries and Index sent Counsel.

8-22-75

True copy of Judgment and opinion of the U.S. Court of Appeals, reversing judgment of the District Court and remanding action for further proceedings, with costs to be taxed against the appellees, filed. Fusaro, C. M-8-22-75.

9-3-75

Order on Remand, entered. The mandate of the Court of Appeals having been received on August 22, 1975, it now becomes necessary to know whether the defendant Commissioner of Welfare intends to continue enforcing § 275, now that he has been advised that he is not required to do so by federal law. The Commissioner is requested to submit a statement of his position on this question by September 12, 1975, so that a determination can be made as to the need for the convening of a three-judge court. Newman, J. M-9-4-75. Copies mailed to all counsel from Hartford.

9-8-75

Plaintiff's Motion for Convening Three-Judge Court filed.

9-8-75

Plaintiff's Motion for Class Action, Preliminary and Permanent Injunction, and for Summary Judgment.

9-16-75

Plaintiffs' Second Interrogatories to Defendants filed.

9-22-75

Notice of Motion for Temporary Restraining Order, Class Action and Convening of Three-Judge Court, filed by Plaintiffs.

Affidavit of Dr. Joseph Horowitz in Support of Motion for Preliminary and Permanent Injunctions and for Summary Judgment, filed.

Affidavit of Dr. James Kauders in Support of Motion for Temporary Restraining Order, filed.

9-23-75

Order endorsed on Plaintiffs' Motion for the Convening of a Three-Judge Court, GRANTING same. Newman, J. M-9-24-75. Copies mailed.

10-6-75

Designation of Judges entered: Jon O. Newman, Judge; Honorable William H. Timbers, U.S.C.A.; and Honorable Robert C. Zampano, filed. Copies mailed. M-10-6-75.

10-17-75

Motion to Strike Affidavits filed by defendant. Copies to three judges.

10-17-75

Memorandum In Support of Defendant's Motion to Strike Affidavits filed. Copies mailed to three judges.

10-23-75

Answers to Plaintiffs' Second Interrogatories to Defendants filed. Copies handed to Zampano, Newman & Timbers, Judges.

Defendant's Response to Plaintiffs' Motion filed. Copies handed to Zampano, Newman & Timbers, Judges.

Affidavit filed by defendant. Copies handed to Zampano, Newman & Timbers, Judges.

10-24-75

Hearing on Plaintiff's Motion for Summary Judgment before Three Judge Court as follows: "Plaintiff's Exhibit A, filed, Booklet "Relative Value"; Plaintiff's Exhibit B, filed; Defendant's oral motion to strike affidavits — decision reserved. Motion for Summary Judgment — Decision reserved. M-8-24-75.

10-31-75

Memorandum of Decision, entered. (Accordingly), those provisions of Sec. 275 that require certification that an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them. Further, the defendants are enjoined from requiring, prior to the performance of an abortion, any form of approval as a condition for the reimbursement of the expenses of an abortion performed during the first trimester of pregnancy. Timbers, C.J.; Zampano, D.J.; Newman, D.J. M-12-31-75. Copies mailed. M-12-31-75. Copies to 3 Judges.

1-16-76

Summary Judgment and Order, consented to by parties, entered. Ordered (1) that this action shall be maintained as a class action under F.R.C.P. Sec. 23(b)(2); (2) that judgment be and is hereby entered in favor of the plaintiffs and the class they represent, declaring that Connecticut Welfare

Department, Public Assistance Manual, Vol. 3, Ch. III, Sec. 275 is invalid as contrary to the United States Constitution, insofar as it requires certification that an abortion is medically or psychiatrically necessary, and insofar as it requires, prior to the performance of an abortion, any form of approval or consent or any condition or requirement for the reimbursement of the expenses of an abortion performed during the first trimester of pregnancy; (3) that Defendants, their agents, etc., are hereby enjoined from requiring certain conditions for the reimbursement by Medicaid, etc. (See Judgment for details) Markowski, C. (Newman, J.) Copies mailed. Copies to 3 Judges. M-1-20-76.

2-13-76

Notice of Appeal to the Supreme Court of the United States filed by Defendants. Copies mailed to counsel of record. Copy of docket entries and Notice of Appeal mailed to Supreme Court of United States. Copies to 3 Judges.

2-20-76

Suggestion that Successor in Office (Edward W. Maher) be Substituted, filed by Defendant.

3-18-76

Letter from Attorney General requesting that record be certified and transmitted to the U. S. Supreme Court.

2.

Connecticut State Department of Social Services
Medical Assistance Program

Manual Vol. 3 — Chapter III

MEDICAL SERVICES

275 *Abortion Services*

The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.

2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. If the patient is *beyond* the first trimester of pregnancy, the abortion must be performed in an accredited hospital and the Chief of Obstetrics and Gynecology certifies in writing that the attending physician has hospital privileges and the abortion will be performed in that hospital.

3. The written request for the abortion is submitted by the patient, and in the case of a minor, from the parent or guardian.

In the case of a committed child, a written consent for the abortion is secured from the Commissioner of the Department of Children and Youth Services as guardian.

4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

Procedures

1. The hospital in which the requested abortion is to be performed, or the clinic which is licensed to perform abortions during the first trimester of pregnancy will submit Form W-217, "Letter Requesting Certification for Reimbursement Abortion", to Health Services in Central Office in which the attending physician certifies that the patient, parent or guardian has requested the performance of an abortion. This is signed by the attending physician in the accredited hospital or licensed clinic when the abortion is performed during the first trimester.

When the abortion is to be performed *beyond* the first trimester of pregnancy, the Form W-217a is completed by both the attending physician and the Chief of Obstetrics and Gynecology. The Chief of Obstetrics and Gynecology certifies that the attending physician has hospital privileges and that the abortion will be performed in that hospital.

2. In addition, Form W-601, "Request for Authorization for Professional Services" must accompany Form W-217 or Form W-217a and should include a statement indicating the medical need for the abortion.

For PA recipients and recipients of services from Unmarried Mothers program, the request will be reviewed by competent medical authority in the Division of Health Services in Central Office, and the hospital or clinic will be notified of the Department's decision by returning two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files.

For Committed Children, completed Forms W-601, 217 and 217a together with Social Data prepared by the D.C.Y.S. Regional Office are submitted to the Department of Children and Youth Services Central Office. Social Data includes all pertinent background information regarding race, age of the

individual, commitment date, the current situation and the individual's wishes and the specific medical necessity.

The packet will then be referred to the Division of Health Services for medical review and recommendation.

After review and recommendation by the Division of Health Services, the complete packet (Forms W-601, W-217 or W-217a and Social Data) will be returned to the Commissioner of Children and Youth Services for his review, decision and signing of the anesthesia permit if he consents to the abortion. If consent is given, Forms W-601, W-217 and W-217a are then returned to the Division of Health Services.

The hospital or licensed clinic is then notified by the Division of Health Services of the Department's decision by forwarding two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files. The Department of Children and Youth Services makes necessary arrangements for the individual's admission to the hospital.

Revised 9-15-75

3.

United States District Court
District of Connecticut

Civil No. N-74-17

SUSAN ROE, ET AL.
Plaintiffs

v.

NICHOLAS NORTON, Et Al.
Defendants

EXCERPTS FROM ANSWERS TO INTERROGATORIES

• • •

4. *QUESTION:* What is the average time lapse between receipt of a request for prior approval in the office of the State Welfare Commissioner and the return of said receipt to the applicant?

ANSWER: Approximately three days from the time of receipt of request until the time it is mailed out to initiating party. (Hospital)

• • •

6A. *QUESTION:* Define the phrase "medically necessary for the patient's health".

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

• • •

7A. *QUESTION:* Define and describe by example every medical circumstance which is included in the category of "medically necessary for the patient's health" with respect to abortion.

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

7B. *QUESTION:* Define and describe by example every medical circumstance included in the category of "not medically necessary for the patient's health".

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

• • •

Dated at Hartford, Connecticut, this 21st day of April, 1974.

NICHOLAS A. NORTON
Commissioner of Welfare
State of Connecticut

BY: .....
HAROLD MCINTOSH, *Assistant Director of Health Services*
Connecticut State Welfare Dept.

4.

(TITLE OMITTED IN PRINTING)

[R. 53]

EXCERPTS FROM ANSWERS TO PLAINTIFFS' SECOND INTERROGATORIES TO DEFENDANTS

• • •

2b. QUESTION: List and describe any and all differences between this regulation and defendants regulations regarding abortion as of January 22, 1974.

ANSWER: The August 26, 1975, revision differs from the policy as of January 22, 1974, in the following respects:

1) The Chief of Obstetrics/Gynecology is no longer required to sign the attending physician's certificate of medical necessity;

• • •

2) The latter revision, unlike the policy in effect in January, 1974, distinguishes between an abortion being sought in the first trimester of the pregnancy, and an abortion to be performed beyond the first trimester.

Form W-217 (Appendix D) is used for first trimester abortions. It contains only the certification of medical necessity to be signed by the attending physician.

Form W-217a (Appendix E) is used for abortions which have progressed beyond the first trimester of pregnancy. In addition to the attending physician's certificate contained on Form W-217, Form W-217a also contains a certification by the Chief of Obstetrics and Gynecology that the attending physician has hospital privileges at the indicated hospital, and that the abortion will be performed in that hospital.

3a. QUESTION: Define the following phrases as used in said amended § 275:

"medically necessary"
"therapeutic abortion services"

ANSWER: The Department of Social Services makes no attempt to define the term "medically necessary." This is a matter left entirely to the medical judgment of the patient's own attending physician.

The term "therapeutic abortion services" is defined in Index 275 of the policy manual as an abortion service covered under the Title XIX when "[T]he abortion is recommended as medically necessary by the attending physician . . ."

3b. QUESTION: Define the phrase "medically necessary for the patient's health" as used in forms W-217 and W-217a;

ANSWER: See Answer to Question 3a.

• • •

7. QUESTION: From August 26, 1975, to the date of these Interrogatories, how many requests for reimbursement for abortion have been refused by any of the defendants, their agents or employees? What was the reason for such refusal?

ANSWER: Since August 26, 1975, to October 20, 1975, two hundred forty-one (241) requests for payment for abortions under the Title XIX Program have been approved; five (5) requests have been rejected because Form 601 and/or Form W-217 had not been completed.

8. QUESTION: During the period June 23, 1975, to August 26, 1975, how many abortions were reimbursed by the medical assistance program and at what cost to the state?

ANSWER: For the period from July 1, 1973, thru June 16, 1974, payment was made for a total of one thousand four hundred and ten (1,410) abortions under the Title XIX program. After the U.S. District Court entered an order, on June 16, 1974, enjoining the enforcement of Index 275 of the defendant's Policy Manual, the Department no longer maintained a record of the number of abortions paid for under Title XIX. It would be possible to retrieve this information from the department's computer, but it would require the writing of a special program — a burdensome task to impose on a Department which is experiencing a continually increasing workload.

• • •

Dated at Hartford, Connecticut, this 21st day of October, 1975.

EDWARD W. MAHER
Commissioner of Social Services

BY: .....
HAROLD V. MCINTOSH
Assistant Director, Health Services

5.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

[R. 44]

MOTION TO STRIKE AFFIDAVITS

Pursuant to Rule 7(b)(1), Federal Rules of Civil Procedure, the defendant moves to strike from the court record, Exhibits A through O which were filed by the plaintiffs together with Plaintiffs Memorandum of Law In Support of Motion For Summary Judgment on or about October 2, 1975, on the ground that the testimony contained therein is inadmissible, and is in contravention of Rule 43(a) of the Federal Rules of Civil Procedure, which requires that the testimony of witness be taken orally in open court.

CARL R. AJELLO
Attorney General

BY: .....
EDMUND C. WALSH
Assistant Attorney General

(Filed October 17, 1975)

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

6.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

[R. 54]

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT p. 28

(OCTOBER 24, 1975)

• • •

MR. WALSH: . . . I have an addition, if Your Honor please, a motion to strike the affidavits submitted by the plaintiffs with their motion for summary judgment. I don't object to the affidavits in the courts evaluating the summary judgment issue of whether or not there is a legal issue but I do think they are inadmissible for purposes of determination on the merits.

JUDGE TIMBERS: The Court has decided, Mr. Walsh, as a matter of procedure to reserve decision on your motion to strike. We will rule on that at the same time we rule on the summary judgment motion. I think we have your position well in mind set forth in the papers.

MR. WALSH: Thank you.

JUDGE TIMBERS: Anything further?

• • •

7.

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

My name is Harold V. McIntosh, and I am employed by the Department of Social Services, State of Connecticut at 110 Bartholomew Avenue, Hartford, Connecticut, as Assistant Director of Health Services. In that capacity I am intimately familiar with the operation of the Department's operation of its Title XIX Medicaid Program, and also with the requirements for payment for abortion thereunder, when such an abortion is required for the patient's health.

I have read the Plaintiffs' Memorandum of Law In Support of Motion for Summary Judgment in this case and I make the following statements in response thereto:

1). I know of no instance where a woman, eligible under the Program, was deprived of a medically necessary abortion operation, so certified by her physician, because of an undue delay in the processing of her application. When the department is notified by telephone by an attending physician that he believes that any delay in performing the abortion operation would pose an increased risk to the patient's health, the Department of Social Services will give oral approval to that physician immediately, by telephone, of the patient's application, on condition that the physician will state that he has signed the certificate of medical necessity and will forward it to the department;

2). Contrary to the assertions contained in the Plaintiffs' Memorandum of Law, abortions which are required for the patient's health are not singled out from all other

services by requiring prior approval therefor. There are a great many services provided under the Medicaid services which require prior approval from the Department;

3). Despite language contained in the Department's current policy on abortions which plaintiffs' have interpreted otherwise, the Department of Social Services *accepts at face value* the certification of medical necessity of the patient's attending physician.

There is no "second-guessing" of the attending physician's certification, nor is there any "review" of his medical judgment. This has been the practice of the Department, for at least since June, 1974 when the U.S. District Court enjoined enforcement of the Department's requirement that an abortion be certified as necessary for the health of the patient;

4). The Medicaid program in Connecticut provides only for necessary medical services, except where federal law mandates that certain other services be provided, as, for example, family planning services and services for persons under 21 years of age under the Early Periodic Screening, Detection and Treatment Program (EPSDT). But even where services are medically necessary, there are exclusions and limitations upon some services even though they are medically necessary.

5). From August 26, 1975 when the Department re-instated, after the decision of the U.S. Court of Appeals, its policy of requiring a certificate of medical necessity from the patient's physician before an abortion would be paid for under the Program, a total of 241 medically necessary abortions have been approved for payment under the

State's Title XIX program, and five (5) have been disapproved for failure to comply with the Department's policy.

Dated at Hartford, Connecticut this 22nd day of October, 1975.

HAROLD V. MCINTOSH
Assistant Director, Health Services
Connecticut Department of Social Services

8.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, CLASS ACTION AND CONVENING THREE-JUDGE COURT

SUSAN ROE, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. I am a real person, twenty-six (26) years of age, a citizen of the United States and a resident of Bridgeport, Connecticut, where I reside with my three children, Ages 9 years, 7 years, and 6 months.

3. SUSAN ROE is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

4. I am unmarried, have recently discovered that I am pregnant and have made the decision not to carry my pregnancy through to term because of the burden and disruption it would cause in my personal life and the lives of my children.

5. My six month old suffers from a defect in one lung and requires periodic medical care, becomes ill easily, and so must be carefully supervised and cared for by me.

6. I am a recipient of Aid to Dependent Children from the State of Connecticut and I am eligible for medical services under the Medical Assistance Program.

7. I have requested an abortion to be performed by Doctor James Kauders at Park City Hospital, but I have not been able to obtain this service because my doctor does not believe that my abortion is medically necessary and I do not have enough money to pay for an abortion myself.

8. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

.....

SUSAN ROE

Sworn to and subscribed before me this 21st day of January, 1974.

(JURAT OMITTED IN PRINTING)

9.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, CLASS ACTION AND CONVENING THREE-JUDGE COURT

JAMES KAUDERS, M.D., being duly sworn, deposes and says:

1. I am a physician specializing in the practice of obstetrics and gynecology in Bridgeport, Connecticut, and I am on the Obstetrics and Gynecology staff of Park City Hospital in Bridgeport.

2. On January 1, 1974, I examined SUSAN ROE, and determined her to be approximately seven weeks pregnant.

3. She requested me to perform an abortion, and I agreed since I found no medical reason indicating that this procedure would be injurious to her health.

4. I stated that my fee for performing the abortion would be ——— and that I would apply for payment in this amount from the State Welfare Department.

5. Ms. ROE'S abortion is a medically approrpriate procedure given her present condition. I do not believe it is medically necessary in the sense that her life or health will be threatened if the abortion is not performed.

6. It is the practice of all physicians associated with Park City Hospital to [illegible]le abortions within the first twelve

weeks of pregnancy if possible; procedures used for such abortions involve a significantly lower risk to the patient than do the procedures which must be used when abortions are done at any later stages of pregnancy.

7. Park City Hospital will not provide abortions to women who are more than —— weeks pregnant except in extremely unusual cases.

.....

JAMES KAUDERS, M.D.

Sworn to and subscribed before me this —— day of January, 1974.

(JURAT OMITTED IN PRINTING)

10.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, CLASS ACTION AND CONVENING THREE-JUDGE COURT

LINDA POE, being duly sworn, deposes and says:

1. I am the mother and next friend of MARY POE, a plaintiff in the above entitled action.

2. My daughter and I are real persons, citizens of the United States, and residents of Bridgeport, Connecticut.

3. MARY and LINDA POE are not our true legal names. We have adopted those names solely for the purposes of this lawsuit to maintain anonymity.

4. My daughter, who is sixteen years old, discovered in September, 1973, that she was pregnant.

5. She informed me of this fact, and stated that she did not wish to carry her pregnancy to term because of the disruption this would cause in her life.

6. She is an excellent student in her junior year at Harding High School in Bridgeport, Connecticut, and was very anxious to continue her education without interruption.

7. I am a recipient of Aid to Dependent Children from the State of Connecticut and I am eligible for medical assistance on behalf of myself and my children.

8. My daughter obtained an abortion at Park City Hospital on October 10, 1974.

9. The Welfare Department has refused to reimburse Park City Hospital for the cost of her abortion because her doctor could not state that the procedure was medically necessary.

10. I am currently indebted to Park City Hospital in the amount of $244.20.

.....

LINDA POE

Sworn to and subscribed before me this 22nd day of January, 1974.

(JURAT OMITTED IN PRINTING)

11.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

BARBARA BYE, being duly sworn, deposes and says:

1. I am a real person, eighteen (18) years of age, a citizen of the United States and a resident of Bridgeport, Connecticut.

2. Barbara Bye is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I have one child, a daughter, age 2½.

4. I am divorced, have recently discovered that I am pregnant and have made the decision not to carry my pregnancy through to term because of the burden and disruption it would cause in my personal life and the lives and well-being of my child.

5. I do not wish to bear an illegitimate child, who would then become dependent for its support on public assistance.

6. I am a recipient of Aid to Dependent Children from the State of Connecticut and I am eligible for medical services under the Medical Assistance Program.

7. I have requested an abortion to be performed by Doctor James Kauders at Park City Hospital, but I have not

been able to obtain this service because my doctor does not believe that my abortion is medically necessary and I do not have enough money to pay for an abortion myself.

8. My inability to obtain an abortion has caused and will continue to cause me severe, emotional anguish.

.....

BARBARA BYE

Sworn to and subscribed before me this 19th day of September, 1975.

(TITLE OMITTED IN PRINTING)

12.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

JAMES KAUDERS, M.D., being duly sworn, deposes and says:

1. I am a physician specializing in the practice of obstetrics and gynecology in Bridgeport, Connecticut, and I am on the Obstetrics and Gynecology staff of Park City Hospital in Bridgeport.

2. On September 19, 1975, I examined Barbara Bye and determined her to be approximately six weeks pregnant.

3. She requested me to perform an abortion, and I agreed since I found no medical reason indicating that this procedure would be injurious to her health.

4. I agreed to apply for payment from the State Welfare Department.

5. Ms. Bye's abortion is a medically appropriate procedure given her present condition. I do not believe it is medically necessary in the sense that her life or health will be threatened if the abortion is not performed.

6. It is, in my opinion, necessary that the abortion be performed forthwith.

7. It is my practice to schedule abortions only within the first twelve weeks of pregnancy; procedures used for such

abortions involve a significantly lower risk to the patient than do the procedures which must be used when abortions are done at any later stage.

8. I will not provide abortions to women who are more than twelve weeks pregnant except in extremely unusual cases.

.....

JAMES KAUDERS, M.D.

Sworn to and subscribed before me this —— day of September, 1975.

(JURAT OMITTED IN PRINTING)

13.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Carol C. a plaintiff in the above-entitled action, deposes and says:

1. I am a resident of Bridgeport, Connecticut, and I am eligible for medicaid from the State of Connecticut for all medical care.

2. I recently discovered that I am pregnant, and I have requested Dr. Eugene Corley of Bridgeport to perform an abortion.

3. Dr. Corley informed me that medicaid would not pay the costs of an abortion, since it is not medically necessary for my health; he told me that I would have to pay for his fee and for all hospital services myself.

4. I am divorced and the mother of three children, ages 6, 7 and 9, and I do not wish to bear another child at this time.

5. I have worked for the past year, and I earn $96.00 per week; I receive $200.00 per month in Aid to Families With Dependent Children.

6. I feel that if I do not have another child, I can im-

prove my earning capacity and become independent of public assistance.

.....

CAROL C.

Sworn to before me this 23rd day of September, 1975.

(JURAT OMITTED IN PRINTING)

14.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Eugene Corley, M.D., deposes and says:

1. I am a physician specializing in the field of obstetrics and gynecology in Bridgeport, Connecticut.

2. I am privileged to practice surgery at Park City Hospital in Bridgeport.

3. a. I have recently examined Carol C. and found her to be approximately eight (8) weeks pregnant.

b. Ms. C. requested that I perform an abortion to terminate her pregnancy and told me she is eligible for medicaid.

c. I find no medical or other reason why this abortion should not be performed, however, there will be no danger to Ms. C's health should she carry her pregnancy to term.

d. I cannot certify to the Department of Social Services that Ms. C's abortion is medically necessary to her health, without violating medical ethics.

e. I believe that abortions performed later than the 10th week of pregnancy carry signficantly greater risk of complication than do those performed earlier.

f. It is, therefore, imperative that I schedule Ms. C. for her abortion immediately.

4. a. I have also recently examined Debbie D., who I believe is in approximately her 5th week of pregnancy.

b. Ms. D requested that I perform an abortion to terminate her pregnancy.

c. There is no medical reason why this abortion should not be performed, however, there will be no danger to Ms. D's health should she carry her pregnancy to term.

d. I cannot certify to the Department of Social Services that Ms. D's abortion is necessary to her health, without violating medical ethics.

e. Because I believe that abortion should be performed as early as possible in the pregnancy, in order to minimize the risks to the patient, I wish to schedule Ms. D. for an immediate abortion.

5. It is my policy not to perform abortions after the twelfth week of pregnancy except in very unusual circumstances.

6. It is my belief that any delay in performance of abortion services for Ms. C. or Ms. D. would inhibit me from providing them with quality medical care.

.....
EUGENE CORLEY, M.D.

Sworn to before me this 23rd day of September, 1975.

(JURAT OMITTED IN PRINTING)

15.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Debbie D., a plantiff in the above-entitled action, deposes and says:

1. I am 19 years old and a citizen of Bridgeport, Connecticut.

2. I recently consulted Dr. Eugene Corley in Bridgeport, and discovered that I am pregnant.

3. I am not married, and I have a six month old child.

4. I do not wish to bear another child at this time, and I have requested Dr. Corley to perform an abortion.

5. Dr. Corley informed me that since there is no medical need for my abortion, medicaid will not pay his fee or the necessary hospital costs, and that, therefore, I would have to guarantee payment myself.

6. I am eligible for medicaid for all other medical care for myself and my child.

7. My income consists of $48.90 per month in Aid to Families With Dependent Children and Social Security payments; I have no means of paying for an abortion at this time.

8. I am a student at Bassick High School in Bridgeport, and am anxious to finish school so that I can support myself and my child.

9. Giving birth to another child would seriously interfere with my ability to become self-supporting and independent of public assistance.

.....

DEBBIE D.

Sworn to before me this 23rd day of September, 1975.

(JURAT OMITTED IN PRINTING)

16.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND FOR SUMMARY JUDGMENT

JOSEPH HOROWITZ, M.D., being duly sworn, deposes and says:

1. I am a physician specializing in the practice of obstetrics and gynecology in Bridgeport, Connecticut, and I am Chief of the Obstetrics and Gynecology staff at Park City Hospital in Bridgeport.

2. Abortion is a service ordinarily furnished at Park City Hospital whenever a patient's attending physician determines that such a procedure should be performed.

3. I have read and am familiar with Section 275 of the Connecticut State Department of Social Services Manual, Volume 3, Chapter III, effective August 26, 1975, as well as the Memorandum from James Morrison to all Chiefs of Obstetrics and Gynecology, dated August 26, 1975.

4. I am familiar with Social Services form W-601, requesting prior authorization, and with forms W-217 and W-217a.

5. It is my professional opinion that the terms "medically necessary" in section 275, and "medically necessary for the patient's health" in forms W-217 and W-217a, refer to situations in which the attending physician believes there will be an

adverse effect upon the physical or mental condition of the patient if the pregnancy is carried to term.

6. When a patient determines that she does not wish to bear a child for personal reasons, and there is no medical reason why she should not carry her pregnancy to term, I cannot attest that an abortion is medically necessary for the patient's health, without violating my professional code of ethics.

7. I will, therefore, not fill out forms W-601, W-217 or W-217a in a case where a patient desires an abortion only for personal or family planning reasons, and I would instruct members of my staff not to do so in similar circumstances.

8. An abortion for family planning reasons is, of course, medically necessary in order to terminate an unwanted pregnancy, in the same sense as other forms of obstetrical care are medically necessary when a patient decides to carry a pregnancy to term.

9. Section 275 additionally requires certification that the patient has requested the abortion, and, for second trimester abortions, that the attending physician has hospital privileges and the abortion will be performed in a hospital.

10. Park City Hospital requires the consent of the patient to all surgical procedures, and I request all patients to sign this form before any surgery is performed.

11. No physician would be permitted to perform an abortion or any other procedure at Park City Hospital unless he or she had privileges at that hospital.

12. To my knowledge, there is no other procedure for which the Department of Social Services requires certification of consent, or of the physician's hospital privileges before it will provide payment.

13. An abortion must be performed as early in pregnancy as possible, in order to minimize the risk to the patient.

14. The requirement that prior approval be obtained before medicaid reimbursement for abortion causes unnecessary delay in performance of abortions for medicaid recipients, and seriously interferes with my ability to provide quality medical care.

.....

JOSEPH HOROWITZ

Sworn to before me this —— day of September, 1975.

(JURAT OMITTED IN PRINTING)

17.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

SANDRA SEREQUE, being duly sworn deposes and says:

1. I am the manager of Patient Accounts at Park City Hospital in Bridgeport, Connecticut.

2. It is part of my duties at Park City Hospital to interview patients requiring elective surgery as to their means of payment, and to apply on behalf of persons eligible for Medicaid for payment from the State Welfare Department.

3. I am familiar with procedures required to obtain Medicaid reimbursement for all hospital procedures, including abortion services.

4. Patients requiring abortion services at Park City Hospital are as a general rule scheduled for such services within four to seven days.

5. During the past year, I have interviewed several Medicaid recipients who wish to have abortions performed at Park City Hospital.

6. January 14, 1974, I applied for prior approval for reimbursement for an abortion performed on plaintiff Mary Poe. Approval was rejected by the Welfare Department on January 21, 1974. On at least six other occasions, I have applied for prior approval for abortions for Medicaid recipients.

7. Because the members of the obstetrics and gynecology staff at Park City Hospital did not sign the required attestations that the abortions were medically necessary for the patients' health, the Welfare Department has in all cases refused reimbursement for abortion services.

8. There is a time lapse of approximately two weeks between the time I submit Form W-601, requesting prior approval, and the time when that form is returned to me indicating whether or not approval has been granted.

9. When I interview a Medicaid patient who wishes to obtain an abortion, I inform her that she must provide some means of payment other than Medicaid, because the Welfare Department will not provide payment without an attestation of medical necessity.

10. On information and belief prior approval is not required for Medicaid reimbursement for any inpatient hospital procedure other than abortion.

. . . . . .

SANDRA SEREQUE

Sworn to before me this 18th day of April, 1974.

(JURAT OMITTED IN PRINTING)

18.

United States District Court

District of Connecticut

CONNECTICUT LAW JOURNAL

September 16, 1975 Pages 35 and 39

DEPARTMENT OF SOCIAL SERVICES

Notice of Intent to Adopt Regulations

In accordance with the provisions of subsection (a) of section 4-168 of the general statutes, as amended, the Commissioner of Social Services hereby gives notice that he intends to adopt this regulation relating to abortion services. The regulation is proposed under the authority of provisions of Part IV of Chapter 302 of the general statutes (Medical Assistance Program).

Parties wishing to present their views regarding this matter must do so within twenty days following the publication of this notice. These may be submitted in writing to the State Commissioner of Social Services, 110 Bartholomew Avenue, Hartford, Connecticut 06115.

• • •

The proposed regulation set forth below as Exhibit "A" is hereby made part of this notice:

EXHIBIT "A"

The regulations of Connecticut State agencies are amended by adding section 17-134d-2b as follows:

Sec. 17-134d-2b. Abortion services

(a) Definition. As used in this regulation, the term "medically necessary" includes psychiatrically necessary.

(b) Payment by the department for services under the Medical Assistance Program (Title XIX) will include payment for abortion services, provided that the payment will be made only for an abortion which is medically necessary, and, in the case of a minor, after written consent to such abortion has been obtained. Prior authorization from the department will be a prerequisite for such payment and shall be made upon consideration of the following:

(1) The abortion shall be requested in writing by the recipient. In the case of a pregnancy within the first trimester, the request for authorization shall be accompanied by a written statement by the attending physician that the abortion is medically necessary and that the abortion will be performed in an accredited hospital or a licensed clinic. In the case of a pregnancy which is beyond the first trimester, the request for authorization shall be accompanied both by the attending physician's written statement that the abortion is medically necessary and by a written certification by the Chief of Obstetrics and Gynecology of an accredited hospital that the abortion will be performed in that hospital and that the attending physician has hospital privileges to practice therein.

(2) If the recipient is a minor, the parent or guardian shall give written consent to the abortion. If the recipient is a committed child, the Commissioner of the Department of Children and Youth Services as guardian shall give the written consent.

Statement of Purpose: To prescribe the general policies of the Department of Social Services as to abortion services.

EDWARD W. MAHER
Commissioner

• • •

19.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

SANDRA SEREQUE, being duly sworn deposes and says:

1. I am the manager of Patient Accounts at Park City Hospital in Bridgeport, Connecticut.

2. It is part of my duties at Park City Hospital to apply for payment by the Welfare Department for services rendered to patients eligible for medical assistance from the State of Connecticut.

3. In the course of my duties I have frequently applied for payment for tubal ligations at the hospital on women eligible for medical assistance.

4. The procedure for obtaining said payment is to submit a completed Form W-285.

5. I have never submitted Form W-601, a request for prior approval, for payment for a tubal ligation.

6. The Welfare Department consistently provides payment for tubal ligation when Form W-285 is correctly submitted.

.....
SANDRA SEREQUE

Sworn to before me this 3rd day of June, 1974.

(JURAT OMITTED IN PRINTING)

20.

FORM W-601

REQUEST FOR AUTHORIZATION
PROFESSIONAL SERVICES NEEDING PRIOR APPROVAL
W-601 REV. 3-70

630471

CONNECTICUT STATE WELFARE DEPARTMENT

Enter Welfare Case Number as shown on right of Medical Services Identification Card.

1. This authorization is valid only if recipient presents current Medical Services Identification Card at time of receiving each service enumerated herein.
2. Mail all 4 copies to State Welfare Department District Office.
3. Do not remove carbons.

ATTENDING CONSULTANT

ACUTE CHRONIC

INITIAL DIAGNOSTIC IMPRESSION

PLEASE INDICATE
1 SERVICES RECOMMENDED
2 NEED FOR SERVICES

TOTAL NUMBER OF VISITS REQUIRED

PERIOD COVERED BY REQUEST

FOR CONSULTANT STATE

NAME OF PRACTITIONER REQUESTING CONSULTATION

ADDRESS

SIGNATURE OF PRACTITIONER OR ADMINISTRATOR

DATE

FOR WELFARE DEPT. ONLY

ELIGIBLE YES NO

REVIEWED BY

DATE

APPROVED FOR VISITS

NOT APPROVED

NOT TO EXCEED

OTHER SERVICES APPROVED

AUTHORIZED BY

TITLE

DATE

NOTE

21.

FORM W-285

Please type or print

HOSPITAL ADMISSION AND DISCHARGE NOTICE

AT ADMISSION ☐ FINAL INVOICE ☐ INTERIM INVOICE HAB 266312

1 Complete Items 1 through 10
2 Please do not remove carbon paper
3 Mail Form 1, 2, 3, including carbon paper between, under cloth, to the address shown immediately below

4 Form 1 and 2 will be returned to the Hospital for Discharge Data and final invoice
5 If liability is accepted by the Welfare Department on Form 1 and 2, follow instructions at bottom of page for interim invoice, if any

TO: Connecticut State Welfare Department, Medical Payments Section, 165 Capitol Avenue, Hartford, Conn. 06115

ADMISSION DATA

1 Name ... 4 Date of Birth
3 NAME OF FACILITY OR ADDRESS ADMITTED FROM (Hospital, Home, etc.)
5 Sex ☐ M ☐ F
6 Hospital, Name and address, Zip Code — PROVIDER NO.
AT DISCHARGE
1 Complete Parts 1, 2, and 3, Items 19 through 24, and INVOICE section 8 FINAL INVOICE
2 Please remove carbon paper
3 Mail Parts 1 and 2 to the address shown above
8 ADMITTING DIAGNOSIS
9 BLUE CROSS AVAILABLE ☐ YES ☐ NO
10 BLUE CROSS MEMBER NO.
11 PATIENT MAY HAVE ACCIDENT OR LIABILITY CLAIM ☐ YES ☐ NO
12 OTHER INSURANCE AVAILABLE ☐ YES ☐ NO
NAME OF INSURANCE COMPANY
POLICY NO.
13 OTHER SOURCE(S) OF PAYMENT
14 DATE ADMITTED
15 PHYSICIAN SERVICES ☐ PRIVATE ☐ GENERAL STAFF
16 SIGNED (Physician) Subject to conditions on reverse side
DATE

WELFARE DEPARTMENT ACTION

17 Liability accepted by Welfare Department at Established Rates for all charges not available from other sources subject to determination of eligibility ☐ YES ☐ NO
18 SIGNED BY (For Welfare Department)
DATE
19 REMARKS

DISCHARGE DATA

20 DISCHARGE DIAGNOSES
21 DATE DISCHARGED
SIGNED BY (For Hospital)
DATE

INVOICE

SERVICES FROM (Date)
THROUGH (Date)
NO. OF DAYS (Use 1.33)
AT
$
TOTAL
12 ☐ Yes ☐ No **NO. OF DAYS EXCESS IS FROM ATTACH APPROVED COPY OF W-288 (INTRA WARD AUTHORIZATION)** HAB
In the event that the patient or any medical insurance policy are available directly to the beneficiary and/or his legally liable relatives, no payment can be billed to the Welfare Department until the Hospital has applied the proceeds of such policy to its charges.

CREDITS
SOURCE — AMOUNT
SOURCE — AMOUNT
TOTAL CREDITS $
NET AMOUNT DUE FROM WELFARE DEPT $

INTERIM INVOICES

1 Use an additional set of these forms
2 X the INTERIM INVOICE block above
3 Complete only items 1, 2, 7, and INVOICE (when Enter HAB No. of Admission Memo
4 Mail part 1 to the Welfare Department address above

22.

FORM W-217

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES

CERTIFICATION FOR REIMBURSEMENT FOR PERFORMANCE OF ABORTIONS ON PATIENTS ELIGIBLE FOR TITLE XIX (FIRST TRIMESTER)

Date .....

State Department of Social Services
110 Bartholomew Avenue
Hartford, Connecticut 06105

Attention:

Dear

I hereby certify that .....
(Name of Patient)

has requested performance of an abortion. She is in her first trimester of her pregnancy. As attending physician it is my opinion that performance of this abortion is medically necessary for the patient's health. This abortion will be performed

at ..... on .....
(Hospital) (Date)

.....
Signature of Attending Physician

23.

FORM W-217a

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES

CERTIFICATION FOR REIMBURSEMENT FOR PERFORMANCE OF ABORTIONS ON PATIENTS ELIGIBLE FOR TITLE XIX
(SECOND OR THIRD TRIMESTER)

Date .....

State Department of Social Services
110 Bartholomew Avenue
Hartford, Connecticut 06105

Attention:

Dear

I hereby certify that .....
(Name of Patient)
has requested the performance of an abortion. She is beyond the first trimester of her pregnancy. As attending physician it is my opinion that the performance of the abortion is medically necessary for the patient's health.

.....
Signature of Attending Physician

Dr. ..... has privileges to practice at
..... and the abortion will be
(Hospital)

performed in this hospital on .....
(Date)

.....
Chief Obstetrics - Gynecology

24.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Linda Poe of Bridgeport, Connecticut deposes and says:

1. I am over 18 years of age.

2. I believe in the obligation of an oath.

3. I am the mother and next friend of Mary Poe, a plaintiff in the above entitled action.

4. In September, 1973, my daughter, Mary Poe, became pregnant.

5. She was sixteen years of age and a student at Harding High School at that time.

6. She obtained an abortion at Park City Hospital because she did not want to bear a child.

7. She intended to continue her education after graduation, so that she could support herself and contribute to the support of the rest of our family.

8. My daughter was and still is in excellent health and did not believe she would suffer physically or that her mental condition would be impaired if she had a child.

9. Therefore her physician did not certify that her abortion was medically necessary, and the State Department of Social Services refused to pay for his or the hospital's services.

10. I myself tried to pay these bills, but was unable to do so and still support my children and myself, on public assistance from the State of Connecticut.

11. If my daughter had not been able to obtain an abortion her child would have become a recipient of aid to families with dependent children and she would have had to leave school to care for it.

12. My daughter graduated from Harding High School in Bridgeport, Connecticut in June, 1975.

13. She is now a first year student at Sacred Heart University in Bridgeport.

14. She is also employed part time as a secretary.

15. I believe that my daughter could never have completed school and gone on to college if she had not been able to have an abortion in 1973.

LINDA POE

Sworn to before me this 20th day of October, 1975.

(JURAT OMITTED IN PRINTING)

25.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Barbara Bye, a plaintiff in the above entitled action, being duly sworn, deposes and says:

1. I am 18 years of age.

2. I believe in the obligation of an oath.

3. I am a resident of Bridgeport, Connecticut and I have one child, a daughter, age 2½ years.

4. I am divorced and am dependent on medical assistance from the State of Connecticut for all my medical needs.

5. In September, 1975 I discovered that I was pregnant and I requested my physician, Dr. James Kauders of Bridgeport, Connecticut, to perform an abortion.

6. I am a healthy person, and I knew my health would not suffer if I were to bear another child.

7. My daughter and I live with my parents, my four sisters and two brothers.

8. If I were to have another child it would cause many problems for the rest of my family, and be very emotionally upsetting for both my parents.

9. Dr. Kauders told me that medicaid would not pay for my abortion unless he could certify that it was medically necessary for my health.

10. Since he and I both believed that neither my physical nor mental health would suffer if I were to have the baby, he did not claim that my abortion was medically necessary.

11. I was able to obtain an abortion only after this Court issued its temporary restraining order of September 23, 1975 compelling the Department of Social Services to pay Dr. Kauders and Park City Hospital for their services.

BARBARA BYE

Sworn and subscribed to before me this 16th day of October, 1975.

(JURAT OMITTED IN PRINTING)

26.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Carol C., a plaintiff in the above entitled action, deposes and says:

1. I am over 18 years of age.

2. I believe in the obligation of an oath.

3. I became pregnant for the fourth time in September 1975.

4. My three other children are 6, 7 & 9 years old and I am dependent on medicaid for all our medical needs.

5. I did not wish to bear a child because I had just begun to work as a visting nurse and wanted to pursue a nursing career.

6. I believe that my mental and physical health would not have suffered if I had not been able to obtain an abortion.

7. I did not want my doctor to claim that my abortion was medically necessary when this was not the case.

8. I was able to obtain an abortion only after this Court granted a temporary restraining order compelling payment for my abortion without certification of medical necessity.

CAROL C.

Sworn to before me this 16th day of October, 1975.

(JURAT OMITTED IN PRINTING)

27.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Debbie D., a plaintiff in the above entitled action, deposes and says:

1. I am 19 years old, a citizen of Bridgeport, Connecticut and the mother of a six month old child.

2. In September, 1975, I consulted with Dr. Eugene Corley of Bridgeport, Connecticut, and discovered that I was pregnant.

3. I am unmarried, and I am completely dependent upon medicaid from the State of Connecticut for all my medical needs.

4. Dr. Corley informed me that medicaid would not pay for an abortion unless he could certify that it was necessary for my physical or mental health.

5. I did not believe that my health would actually suffer if I were to bear another child, and I did not want to lie or have Dr. Corley lie to obtain medicaid payment.

6. I did obtain an abortion when this court issued its temporary restraining order of September 23, enjoining the state from refusing to pay for my abortion.

7. I wanted an abortion because I am trying to complete high school and care for my child at the same time.

8. I did not feel that I could care for two young children and still continue my schooling.

9. Were I to have another child at this time, it would mean I would be dependent on public assistance for several more years.

DEBBIE D.

Sworn and subscribed to before me this 16th day of October, 1975.

(JURAT OMITTED IN PRINTING)

28.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

JOSEPH HOROWITZ, M.D., of Bridgeport, Connecticut deposes and says:

1. I am over 18 years of age.

2. I believe in the obligation of an oath.

3. I am a physician licensed to practice medicine and surgery in the State of Connecticut.

4. I specialize in the practice of obstetrics and gynecology in Bridgeport, Connecticut, and I am Chief of the Obstetrics and Gynecology staff at Park City Hospital in Bridgeport.

5. As part of my practice I perform abortions in Park City Hospital.

6. It is my professional opinion that the safest time to perform any abortion is prior to the twelfth week of pregnancy and abortion should be performed as early in pregnancy as possible because the procedure is simpler when the tissue mass in the uterus is less.

7. During this time period, abortions are accomplished by means of a method known as suction curettage in which a hollow tube is inserted through the woman's cervix and by suction the fetus, placenta, and other tissue are drawn out through the tube.

8. The procedure is done under local anesthesia, requires no overnight hospital stay, and generally takes between ten and fifteen minutes, in addition to preparatory laboratory work.

9. After the twelfth week of pregnancy abortion is accomplished by removing the amniotic fluid from the uterus and injecting in its place a substance which induces uterine contractions, or labor and thereby aborts the fetus.

10. Until recently a saline solution was injected into the uterus; at present most physicians prefer to inject the hormone prostaglandin to stimulate contractions.

11. There is a delay of 12 to 30 hours between injection of prostaglandin and the onset of labor. During this period the patient must remain in the hospital under observation.

12. The likelihood of complications associated with abortion is greater when performed after the twelfth week of pregnancy.

13. In up to 50% of all cases, the placenta is not fully expelled by the patient and must be removed, either manually or surgically, in some cases under a general anesthesia.

14. The injection and subsequent surgery carry the risk of infection to the patient.

15. Many patients experience nausea and vomiting from prostaglandin; saline injections have led to heart failures in some cases.

16. Because of the risks involved, I do not perform any abortions on women who are more than twelve weeks pregnant.

17. I have read and am familiar with section 275 of the

Connecticut Manual of Public Assistance, dealing with medicaid reimbursement for abortion.

18. In my opinion an abortion is not medically necessary unless there is some indication that her physical or mental health will deteriorate in some way if she carries a pregnancy to term.

19. Examples of such patients would be those with a history of chronic hypertension or kidney disease, or those who had suffered a mental breakdown after a previous pregnancy.

20. I believe cases where an abortion is medically necessary are less than 5% of all abortions.

21. The vast majority of abortions are requested for social or economic reasons; most women are capable of accepting and caring for another child without deteriorating either psychologically or physically.

22. To certify to medical necessity for abortions is to engage in a subterfuge to circumvent the state's imposition of its judgment on the abortion question.

23. I do not believe the state should force physicians to take dishonest positions in order to provide adequate care to medicaid recipients.

24. Even if I had a patient for whom I could certify that an abortion was medically necessary, the need to obtain prior authorization means that I must delay a procedure which should be performed as soon after diagnosis as possible.

25. It is my practice to schedule abortions within 48 to 72 hours of a diagnosis of pregnancy.

26. For many patients, waiting for prior authorization pro-

longs the period before the abortion can be performed, and in many cases brings the patient close to or beyond the twelfth week of pregnancy, when labor must be induced with prostaglandin at significantly increased risk.

27. There is no other procedure that I perform, including elective surgery or sterilization, in which the state imposes its medical judgment in any way before providing medicaid reimbursement.

JOSEPH HOROWITZ, M.D.

Sworn and subscribed to before me this 20th day of October, 1975.

(JURAT OMITTED IN PRINTING)

29.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Eugene Corley, M.D. of Bridgeport, Connecticut deposes and says:

1. I am over 21 years of age.

2. I believe in the obligation of an oath.

3. I am a physician licensed to practice medicine and surgery in the State of Connecticut.

4. I am a specialist in the practice of obstetrics and gynecology and am a member of the obstetrics and gynecology staff of Park City Hospital in Bridgeport, Connecticut.

5. I am the Chairman of the Medical Committee of the state NAACP.

6. My practice consists largely of service to low-income women in Bridgeport, Connecticut.

7. Approximately 70% of my patients are dependent on medicaid from the State of Connecticut for all of their medical care.

8. In many years of practice I have made the following observations about medicaid patients and about low income minority group patients in general.

a. Women with low incomes have less access to conventional forms of birth control than women with resources to obtain private medical care;

b. Such women are therefore more often forced to resort to abortion as a means of preventing unwanted childbirth;

c. Low income women often do not consult a physician as rapidly as middle and upper income patients;

d. Low income patients are therefore more likely to request abortions when they are more than eight weeks pregnant; late abortions are more frequent among Black and low income women;

9. Abortion is a procedure which becomes increasingly complicated as pregnancy progresses and the fetus and uterine tissue mass increase in size.

10. Beyond the twelfth week of pregnancy abortion must be performed by inducing uterine contractions through the injection of the hormone prostaglandin.

11. This procedure carries three to four times the risk of complication as earlier abortion.

12. I do not perform any abortions after the twelfth week of pregnancy.

13. I have read and am familiar with Section 275 of the Connecticut Manual of Public Assistance.

14. By requiring prior authorization before an abortion can be performed on a medicaid patient, the State Department of Social Services forces women to delay performance of a procedure which must be done as rapidly as possible.

15. In every case the risk to the patient is increased by awaiting prior authorization.

16. Medicaid patients as a group are more likely to request abortion when they are close to the twelfth week of pregnancy; these women are forced to seek second trimester abortions by the prior authorization requirements.

17. I will not certify that an abortion is medically necessary for a patient's health unless there is a bona fide medical reason why she should not carry her pregnancy to term.

18. The large majority of my patients request abortions for economic reasons: an unwanted child would cause great financial hardship for them or their families.

19. Many of my patients are struggling to build a better life for themselves and their families; and an unplanned pregnancy can ruin any chance they have of breaking the cycle of poverty.

20. Women in this situation can, of course, carry a pregnancy to term and care for another child without any change in their psychological condition or their physical health.

21. I do not believe the State of Connecticut should force poor women and their physicians to falsify the facts so that they can obtain abortion services.

EUGENE CORLEY, M.D.

Sworn to before me this 20th day of October, 1975.

(JURAT OMITTED IN PRINTING)

30.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

GORDON JONAS, M.D., being duly sworn, deposes and says:

1. I am over 18 years of age.

2. I believe in the obligation of an oath.

3. I am a physician specializing in the practice of obstetrics and gynecology in Fairfield, Connecticut, and I am on the Obstetrics and Gynecology Staff of Park City Hospital in Bridgeport.

4. As part of my practice, I perform abortions at Park City Hospital.

5. I have performed abortions for several patients who are recipients of medical assistance from the State of Connecticut.

6. I have read and am familiar with Section 275 of the Connecticut State Department of Social Services Manual, Volume 3, Chapter III, effective August 26, 1975.

7. I am familiar with Social Services form W-601, requesting prior authorization and with forms W-217 and W-217a.

8. It is my opinion, based on my experience as a practicing physician, that Section 275 seriously inhibits me from

providing optimum medical care to those patients of mine who are recipients of medical assistance from the State of Connecticut, for the following reasons:

a) Section 275 excludes payment for abortions which are not "medically necessary for the patient's health";

b) It is my opinion that every abortion, by definition, is necessary, because it is the only means of terminating an unwanted pregnancy;

c) Section 275 indicates that the State Department of Social Services does not define necessary in the sense of being necessary to terminate the pregnancy, but requires an additional showing that continued pregnancy will result in a deterioration of the physical or mental condition of the mother;

d) I do not believe that when a patient chooses an abortion for personal or family planning reasons, that abortion is medically necessary for her health; therefore, I cannot certify that such an abortion is medically necessary without violating my medical ethics;

e) It is common knowledge that the overwhelming majority of abortions are performed as a family planning technique and not because of any danger to the physical or mental health of the mother;

f) The result of Section 275 is that I am forced to deny services to women dependent on medicaid, which services I and the hospital routinely provide for women who have the resources to pay for them;

g) I have consistently refused to perjure myself and claim medical necessity when none, in fact, exists;

h) It seems to me to be highly undesirable for the welfare department to ask physicians to lie about their reasons in order to give their patients the care they need;

i) Even if I were willing to certify to medical necessity, Section 275 forces me to delay preparation for the abortion until I am able to obtain prior authorization from the Central Office of the Department of Social Services;

j) Abortion is a procedure which must be performed as early in pregnancy as possible; because the condition of pregnancy progresses from day to day, any delay in abortion increases the risk of complication for the patient;

k) It is my practice to schedule patients for abortion within five days of the final abortion decision;

l) I do not perform any abortions after the twelfth week of pregnancy;

m) I know of no hospital facility in Fairfield County which will perform abortions after the twelfth week of pregnancy;

n) Yale New Haven Hospital has recently instituted a new policy whereby it will not perform any abortions beyond the twelfth week for patients living outside New Haven County; (See letter to Nathan Kase, attached hereto.)

o) Many women who are medicaid recipients request abortions later in pregnancy than do other women and to await prior authorization in these cases postpones the abortion beyond the twelfth week and, therefore, denies them the possibility of a safe, legal abortion by the physician of their choice.

GORDON JONAS, M.D.

Sworn to before me this 20th day of October, 1975.

(JURAT OMITTED IN PRINTING)

31.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

HARRIET BOGRAD of New Haven, Connecticut deposes and says:

1. I am over 18 years of age.

2. I believe in the obligation of an oath.

3. I am the Executive Director of Women's Health Servies, Inc. of New Haven, a clinic licensed to perform abortions by the State of Connecticut, which provides abortions for women less than twelve weeks pregnant, as well as pre-abortion and post abortion counselling and other services.

4. Women's Health Services, Inc. has provided abortions for many women dependent for payment upon medicaid, or medical assistance from the State of Connecticut.

5. Upon receiving the revised section 275 of the Connecticut Manual of Public Assistance, I telephoned Harold MacIntosh, Assistant Director of Health Administration, to ask him to clarify what regulation meant by "medically necessary for the patient's health."

6. Mr. MacIntosh responded by stating to me that the Department of Social Services would grant prior authorization for an abortion when the following statement as to medical necessity is submitted on form W-601:

"Continuation of this pregnancy places this woman's health at considerable risk because of her present state of physical and mental stress. Our medical director recommends that this pregnancy be terminated as soon as possible."

HARRIET BOGRAD

Sworn to before me this 20th day of October, 1975.

(JURAT OMITTED IN PRINTING)

32.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

Patricia Tunstall, a resident of New Haven, Connecticut deposes and says:

1. I am over the age of 18.

2. I believe in the obligation of an oath.

3. I am a health worker at Women's Health Services, Inc. of New Haven, a clinic licensed to perform abortions by the State of Connecticut, which provides abortions to women less than twelve weeks pregnant, as well as pre-abortion and post-abortion counselling and other services.

4. My work at Women's Health Services involves answering telephone inquiries, supervising telephone inquiries, counselling and secretarial work.

5. Approximately ten percent of the patients at Women's Health Services are medicaid recipients.

6. Since August 26, 1975, I have received telephone calls from several medicaid recipients who state that they do not think medicaid will pay for their abortion.

PATRICIA TUNSTALL

Sworn and subscribed to this 20th day of October, 1975.

(JURAT OMITTED IN PRINTING)

33.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

MARY HENNESSY, being duly sworn, deposes and says:

1. I am over 18 years of age and a resident of Stratford, Connecticut.

2. I believe in the obligation of an oath.

3. I am a social worker in the Department of Obstetrics and Gynecology at Bridgeport Hospital, Bridgeport, Connecticut.

4. As part of my duties at Bridgeport Hospital I answer telephone inquiries from persons seeking abortions.

5. Most inquiries coming to my office are from women receiving medicaid from the State of Connecticut, who have gone first to the Bridgeport Hospital clinic or to their private physicians.

6. Since August 26, 1975 I have received many calls from women who believe that medicaid will not provide payment for abortion services.

7. These women indicate to me that the State will not pay for abortions and often refer to a notice sent to them with their monthly aid to Families with Dependent Children checks, stating that abortions must be medically necessary.

8. Since August 26, 1975, there has been a decrease in the number of requests for abortions from medicaid recipients.

9. As another part of my work at Bridgeport Hospital I fill out and process all requests for prior authorization from the Department of Social Services for all obstetrics and gynecology patients.

10. There is no other obstetrical or gynecological procedure for which the Department of Social Services requires prior authorization or a certification of medical necessity.

MARY HENNESSY

Sworn and subscribed to before me this 15th day of October, 1975.

(JURAT OMITTED IN PRINTING)

34.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

BETTY CARRION, being duly sworn, deposes and says:

1. I am over 18 years of age and a resident of Trumbull, Connecticut.

2. I believe in the obligation of an oath.

3. I am a social worker at Bridgeport Hospital, Bridgeport, Connecticut, in the obstetrics and gynecology department.

4. As part of my work at Bridgeport Hospital I answer telephone inquiries from women about abortions.

5. Nearly all calls to my office are from patients who have gone to the hospital clinic, or from patients of private physicians who must use medicaid to pay for their services.

6. Since August 26, 1975, I have received many calls from women who indicate that the State Department of Social services will not pay for their abortions because the abortions are not medically necessary.

7. These women believe that they will have to find some other means of paying for their abortions.

BETTY CARRION

Sworn and subscribed to before me this 17th day of October, 1975.

(JURAT OMITTED IN PRINTING)

(CERTIFICATION OMITTED IN PRINTING)

35.

United States Court of Appeals
For The Second Circuit

EXCERPT FROM MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*, pp. 9, 10 (submitted at request of the U.S. Court of Appeals (2d Cir.) in *Roe* v. *Norton*, 522 F.2d 928, filed on or about February 1, 1975).

• • •

"Similarly, we believe that title XIX of the Social Security Act does not preclude a requirement in a state's Medicaid program of prior approval by the state. Indeed, where a state wishes to ensure that limited resources will be used only for medically necessary procedures, a requirement of prior approval for Medicaid payments may be the most efficient way of administering the program in the best interests of the recipient. See 42 U.S.C. 1396a (a) (19). A reasonable prior authorization expeditiously handled would not be inconsistent with Title XIX."

• • •

Respectfully Submitted,

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Supreme Court U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAIER, Commissioner of Social Services of the State of Connecticut,

Appellant

V.

SUSAN ROE, et als

Appellees

On Appeal from the United States District Court for the District of Connecticut

APPELLEES' MOTION TO AFFIRM

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INDEX

Table of Citations	i
Motion to Affirm	1
Opinions Below	1
Statement of the Case	1-2
The Reasons Why the Motion Should Be Granted: Connecticut's Medicaid Regulations Unconstitutionally Infringe Upon Appellees' Constitutional Right to Have an Abortion and No Sufficient State Interest Has Been Advanced to Justify the Infringement.	3-5

TABLE OF CITATIONS

Doe v. Bolton, 410 U.S. 179 (1973)	5
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	4
Roe v. Wade, 410 U.S. 113 (1973)	3,5
Shapiro v. Thompson, 394 U.S. 618 (1969)	3

THE MOTION TO AFFIRM

The appellees move to affirm the judgment of the United States District Court for the District of Connecticut entered herein on January 16, 1976, which is set out at length in Appendix B, pages 26 et seq, of the Appellant's Jurisdictional Statement, which judgment declared unconstitutional certain requirements of Volume 3, Chapter III, Section 275 of the Connecticut Welfare Public Assistance Manual (1) relative to the performance of abortions and reimbursement by Medicaid of the expenses therefor and ordered appellant to give notice to persons eligible for Medicaid assistance that abortion is a physician's service eligible for Medicaid reimbursement.

OPINIONS BELOW

The opinions below are set out at pages 1 - 2 of Appellant's Jurisdictional statement.

The memorandum of decision and the judgment to which this motion is addressed appear respectively as Appendix A at pages 18 et seq and Appendix B at pages 26 et seq of Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought by several women who having become pregnant and decided in consultation with their physicians to terminate their

---

(1) During the pendency of this action there was a reorganization of the Connecticut agencies involved in this litigation. The identical regulations are now to be found in the Department of Social Services Manual and are those set out at length in Appendix D, pages 30 et seq, Appellant's Jurisdictional Statement.

pregnancies by abortion during the first trimester of pregnancy were denied reimbursement for the costs of this medical procedure by the State of Connecticut even though they were entitled to receive medical benefits as recipients of public assistance. The basis of the denial of the benefits was the failure and refusal of their doctors to seek prior approval of the operation, to certify as to the medical necessity of the operation or to furnish certification that the patient requested its performance, all as required by the regulations of the department.

A single judge acting for the United States District Court for the District of Connecticut found the constitutional claim to be substantial and held as to the statutory claims that Title XIX (Medicaid) of the federal Social Security Act, 42 U.S.C. 1396 et seq, neither required nor prohibited payment for elective abortion. 380 F. Supp. 726 (D.Conn., 1974).

On appeal by the State, the United States Court of Appeals for the Second Circuit held that the Act was neutral as to abortion payments, that the State of Connecticut was not required by it to follow the policy as to reimbursement for abortions adopted by it, and remanded to the District Court for the consideration by a three judge court of the constitutional questions raised in the event the state chose to continue its policy. 522 F. 2d 934 (C.A.2,1975).

The State of Connecticut then adopted the regulations set out in Appendix D, pages 30 et seq of Appellant's Jurisdictional Statement, in essence continuing its prior policy.

Appellees moved that a three judge court be convened and filed a motion for summary judgment which was after hearing granted, the court holding that the regulations' requirements for a certificate of medical necessity and for prior approval of the performance of an abortion were unconstitutional. (Appendix A, pages 18 et seq, Appellant's Jurisdictional Statement.)

Appellees here move the Court to affirm that decision.

THE REASONS WHY THE MOTION SHOULD BE GRANTED

This Court in 1973 proclaimed that a woman has, as a part of her right to privacy, the right to decide whether to terminate a pregnancy by abortion and that that decision during the first trimester of pregnancy is a medical one to be reached by a physician in consultation with his or her patient "free of interference by the State." Roe v. Wade, 410 U.S. 113,163 (1973).

There are of course women such as these appellees who do not themselves have the funds to enable them to exercise that right - who as recipients of public assistance look to governmental agencies for the costs of the medical care necessary to the performance of the abortion.

The appellant in his jurisdictional statement argues at length that the appellees do not have a right to such assistance, but that is not the issue here. Connecticut already does provide public assistance; as a part of that public assistance it provides medical assistance through its 'medicaid' program; as part of that medicaid program it provides medical assistance for pre and post-natal care; and as part of that medicaid program it provides medical assistance for therapeutic abortions.

Although it need not have a program of public assistance, once it does have such a program it cannot condition the receipt of benefits thereunder upon a requirement of residency since such a requirement would infringe upon a fundamental constitutional right, the right of freedom of movement and freedom of travel. Shapiro v. Thompson, 394 U.S. 618 (1969). So too if public

emergency medical care is provided, its provision cannot be limited by a residential requirement since that would infringe on the freedom of movement. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

As the Court below found:

> "...once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion."
>
> Appendix A, page 20, Appellant's Jurisdictional Statement.

It went on to point out that the state, by making funds available only for therapeutic abortions and for pre and post-natal care, weights the choice of the pregnant woman who is dependent on public assistance against her free exercise of her constitutional right.

No sufficient state interest has been asserted by the appellant to justify the infringement of the exercise by the appellees of their rights. In his jurisdictional statement, as in the court below, appellant relies on his claim that Connecticut cannot afford to pay for non-therapeutic abortions. As was said by this Court in Memorial Hospital v. Maricopa County, supra, "conservation of the taxpayer's purse" is not sufficient to satisfy the standard which must be satisfied where fundamental rights are concerned. Even were that not the case, the alternative to the cost of the abortion is a risk of far greater expense for the carrying through to term of the pregnancy and the delivery of a child who would in all probability require public assistance for years. See Footnote 4, Decision Below, Appendix A, page 25, Appellant's Jurisdictional Statement.

Nor has the state advanced any sufficient interest to justify its requirement for prior approval of the performance of an abortion as a condition for reimbursement of the costs.

This Court clearly held in Roe v. Wade, supra, that in the first trimester of pregnancy, the abortion decision is to be left wholly with the attending physician and the patient, and in a companion case nullified review procedures of the abortion decision in a Georgia statute, saying:

> " The woman's right to receive medical care in accordance with the licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed review."
>
> Doe v. Bolton, 410 U.S.179,198

Appellant in his jurisdictional statement merely raises factual questions as to whether the prior approval requirement in fact need delay the performance of the abortion. Nowhere does he provide any justification for the procedure. Absent a compelling state interest the prior approval requirement was properly held below to be an unconstitutional infringement on appellees' constitutional rights.

We urge the Court therefore to affirm the judgment below.

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Supreme Court, U. S.
FILED
AUG 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

SUSAN ROE, et als.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLANT

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dant-Commissioner's Requirement That Prior Approval Be Obtained Before Payment Would Be Made For An Abortion, Since There Was A Disputed Question Of Fact On This Issue 28

III. The District Court Improperly Struck Down The Requirement That, Before An Abortion Would Be Paid For Under The Title XIX Medicaid Program, The Recipient-Applicant's Prior Written Consent Must Be Obtained 30

Conclusion 30

CASES CITED *Page*

Boddie v. Connecticut, 401 U.S. 371 (1971) 17, 18

Chicago Police Department v. Mosely, 408 U.S. 92 (1972) 22

Dandridge v. Williams, 397 U.S. 471 (1970) .. 7, 8, 19, 21, 28

Doe v. Beal, 523 F.2d 611 (3rd Cir. 1975) 16, 20

Doe v. Bolton, 410 U.S. 179 ..... 9, 14

Doe v. Wohlgemuth, 376 F.Supp. 173 (W.D. Pa. 1974) 16, 20

Douglas v. California, 322 U.S. 354 (1963) 18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 22, 25

Griffin v. Illinois, 351 U.S. 12 (1956) 17, 18

Helvering v. Davis, 301 U.S. 619 (1937) 15, 24

Jefferson v. Hackney, 406 U.S. 535 (1972) 28

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 21

McGowan v. Maryland, 366 U.S. 420 (1961) 24

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 10, 13, 26

Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 (1913) 21

Ortwein v. Schwab, 410 U.S. 656 (1973) 18

Planned Parenthood of Central Missouri v. Danforth, 44 U.S.L.W. 1197 (1976) 9, 30

Richardson v. Belcher, 404 U.S. 72 (1971) 28

Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975) 20

Roe v. Norton, 380 F.Supp. 726 (D. Conn. 1974), *reversed and remanded*, 522 F.2d 928 (2nd Cir. 1975) 4, 5

Roe v. Wade, 410 U.S. 113 (1973) 6, 14

Rosado v. Wyman, 397 U.S. 397 (1970) 26

Shapiro v. Thompson, 394 U.S. 618 (1969) 10, 13, 18

Sosna v. Iowa, 419 U.S. 393 (1975) 10

Stanley v. Georgia, 394 U.S. 557 (1969) 18

United States v. Butler, 297 U.S. 1 (1936) 15

United States v. Kras, 409 U.S. 434 (1973) 18

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

SUSAN ROE, et als.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLANT

OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is reported at 408 F. Supp. 660 (1975). A copy of that opinion is contained in the juris. statement (No. 75-1440), at p. 18. Earlier opinions in this same case are reported in 380 F. Supp. 726 (D. Conn. 1974) (in which a single-judge District Court considered the pendant statutory claim and ruled that the state regulation was "invalid as contrary to the Medicaid provisions of the Social Security Act); and in 522 F.2d 928 (2d Cir. 1975) (in which the Court of Appeals reversed and remanded for convening

of a three-judge district court to consider the constitutional issues, one judge concurring in part and dissenting in part).

JURISDICTION

This action was brought by plaintiffs (appellees) under 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3) and 28 U.S.C. § 2281. In the hearing on remand from the Court of Appeals before a three-judge District Court, the plaintiffs were seeking injunctive relief restraining the appellant-state commissioner of social services from the enforcement, operation and execution of a regulation of statewide applicability on the ground of its unconstitutionality.

The three-judge District Court, after a hearing on plaintiffs' motion for summary judgment, entered judgment on January 16, 1976, (Juris. Statement, p. 26), and this appeal was docketed on April 9, 1976.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amendments to the Constitution of the United States

• • •

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Sections 17-134a and 17-134d of the General Statutes of Connecticut, Revision of 1958, Revised to January 1, 1975, are the statutes involved in this action; and Section 275, Volume 3, Chapter III, Connecticut Department of Social Services, Public Assistance Program Manual is the regulation whose validity is involved in this action. The statutes read as follows:

> Sec. 17-134a. Acceptance of federal grants for medical assistance. The welfare commissioner is authorized to take advantage of the medical assistance programs provided in Title XIX, entitled "Grants to States for Medical Assistance Programs," contained in the Social Security Amendments of 1965 and may administer the same in accordance with the requirements provided therein, including the waiving, with respect to the amount paid for medical care, of provisions concerning recovery from beneficiaries or their estates, charges and recoveries against legally liable relatives, and liens against property of beneficiaries.
>
> Sec. 17-134d. Regulations. The welfare commissioner may make such regulations as are necessary to administer the medical assistance program.

A copy of the regulation, Section 275, is contained at A. 7.

QUESTIONS PRESENTED

Under Connecticut's Title XIX Medical Assistance ("Medicaid") Program, payment for medical services to eligible recipients is limited to those which are medically necessary for the patient's health. Payment for an abortion under the

program will be made if the recipient's attending physician will certify that the abortion is either medically or psychiatrically necessary for the patient's health. The attending physician's certification of medical necessity in such a case is never challenged.[1]

The questions presented by this appeal are:

I. Whether the failure of Connecticut's medical assistance program to also include a provision for payment of the cost of an abortion which is admittedly not necessary for the patient's physical or psychiatric health violates the plaintiffs' rights under the equal protection clause of the Fourteenth Amendment, or any other of plaintiffs' constitutionally protected rights.

II. Whether, on a motion for summary judgment, it was proper for the district court to enjoin the defendant-commissioner's requirement that prior approval be obtained before payment would be made for an abortion under Medicaid, since there was a disputed issue of fact on this question.

III. Whether the district court improperly struck down the requirement that, before an abortion would be paid for under the Title XIX medical program, the recipient-applicant's prior written consent must be obtained.

STATEMENT

This action was brought by two women who were eligible for and receiving medical benefits under Connecticut's "Medicaid" program. Plaintiff Roe had had an abortion in September, 1973, for which the welfare department had refused to pay the hospital bill of $244.20. Plaintiff Poe was

[1]"The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician." *Answer to Interrogatories*, question 6A, (A. 10).

pregnant at the time the suit was brought and she obtained a temporary restraining order which prevented the defendant welfare department from refusing to pay under its Medicaid program the costs of her abortion.

Neither plaintiff submitted to the (then) welfare department the certification of her physician that the abortion was medically or psychiatrically necessary for the patient's health.[2]

On the plaintiffs' motion for a summary judgment, a single-judge District Court found that the constitutional claim was sufficiently substantial to invoke the jurisdiction of the court and to justify consideration of the pendant statutory claim without convening a three-judge court pursuant to 28 U.S.C. § 2281.

The District Court thereupon, found that the defendant's regulation concerning abortion services was "invalid as contrary to the Medicaid provisions of the Social Security Act" and permanently enjoined its enforcement. *380 F. Supp.* 726, 730.

On appeal by the defendant, the U.S. Court of Appeals (2d Cir.) reversed the decision of the District Court, holding that "while Title XIX *permits* federal reimbursement for elective abortions, it does not *forbid* state regulations limiting Medicaid payments for abortions to those which are therapeutically necessary for the health of the pregnant woman." *522 F.2d* 928, 935, and remanded the case for the convening of a three-judge court to consider the constitutional issues pursuant to 28 U.S.C. § 2281.

[2]The plaintiffs have admitted that the abortions for which payment was being sought were *not* abortions which were medically necessary for the respective patient's health. That determination was made in each case by the physician of each plaintiff's own choosing. See affidavits of Drs. Kauders (A. 22, 28); Corley (A. 32, 60 and 62); Horowitz (A. 36 at 37, 56 at 58); Jonas (A. 63 at 64).

The three-judge District Court, on remand, after oral argument on plaintiffs' motion for summary judgment, found that "those provisions of § 275 that require certification that an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them." 522 *F.2d* 928.

SUMMARY OF ARGUMENT

Connecticut does not infringe upon the plaintiffs' constitutionally protected rights to an abortion, as enunciated by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), when it fails to provide, under its Title XIX Medical Assistance Program, payment for an elective, non-therapeutic abortion.

Under that program, payment is made for an abortion if it is medically necessary for the patient's health. Similarly, payment is made for medical services for childbirth and for prenatal and postnatal care but only for such services which are medically necessary for the patient's health. Payment for an abortion, however, requires that prior authorization for payment be obtained from the Department of Social Services — most physician's services for prenatal and postnatal care would not require such prior authorization. To obtain such prior authorization, the patient's own physician must certify in writing that such an abortion is medically necessary for the patient's health. This physician's certification is not questioned by the Department of Social Services and the medical judgment of the physician is not subject to further review of any kind (Answers to Interrogatories, A. 10, 11; Answers to Plaintiffs' Second Interrogatories to Defendants, A. 12 at 13).

The district court has held *inter alia*, that "when Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs

the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion . . . [H]er choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972)." Memorandum of Decision, Juris. Statement, No. 75-1440, 20-21.

However, since the requirement that they be medically necessary for the patient's health applies to all medical services provided, no invidious discrimination is made by the State in its treatment of abortion under the program.

If this is so, then, contrary to the district court's holding below, there is no infringement upon the plaintiffs' constitutionally protected right to an abortion — the State does *not* "weigh the choice of the pregnant mother against choosing to exercise her constitutionally protected right" — and the holding of the lower court really amounts to a claim that the State is required to fund, for an indigent, the cost of the exercise of a fundamental right. Such a proposition is *not* supported by the prior decisions of this Court.

In determining whether the State's policy on payment for abortions results in a denial of the plaintiffs' rights to equal protection, the appropriate standard to be applied, under the prior decisions of this Court, is the "rational basis" test enunciated in *Dandridge* v. *Williams*, 397 U.S. 471 (1970), and *not* the "compelling state interest" test of *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), a case which the district court cited in support of its decision. This is so because the issue involved in this case is *not* the plaintiffs' constitutionally protected right to choose to have an abortion — Connecticut does not interfere with that choice — but, rather the right of the

plaintiffs to receive medical welfare benefits. Connecticut's policy on payment for abortion under Medicaid easily meets the former test, since the state's reason for limiting the scope of coverage under its medical program to medical services which are medically necessary for the patient's health (including abortion services) is the need to limit the size of its welfare budget, especially at a time when it is experiencing a fiscal crisis. This reason was articulated by defendant's counsel at oral argument on the plaintiffs' motion for summary judgment in response to questions from the court. (Transcript of Proceedings, R. 54, p. 25). This reason was rejected by the district court in its memorandum of decision wherein it went on to state that:

> "The only other possible state interest [for Connecticut's policy on payment for abortions under its Medicaid program] would be that of avoiding the expenditure of public funds for a purpose the state finds morally objectionable." (Memorandum of Decision, Juris. statement, No. 75-1440, 18 at 21).

Thus, the district court imputed, improperly, to the defendant-commissioner a motive for his policy on payment for abortions for which there was no support whatever in the record. The articulated reason for Connecticut's policy, i.e., the need to limit the expenditure of state funds for public welfare, successfully meets the equal protection test set forth in *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

Additionally, it was improper for the district court to also strike down the requirement of Connecticut's program that prior approval be obtained from the Department of Social Services, before payment would be made for an abortion. The district court held "[t]he prior approval procedure creates the sort of delay that the Supreme Court found constitutionally

repugnant in *Doe* v. *Bolton, supra*" (Memorandum of Decision, *supra*, at 23).

This action should not have been taken on a motion for summary judgment since there was a disputed issue of fact on this question. This disputed issue of fact was brought to the lower court's attention by an affidavit, timely filed (A. 17; R. 52), and also raised by defendant's counsel at oral argument on the motion for summary judgment. (Transcript of Proceedings, R. 54, p. 25).

Finally, the district court's action in also striking down the further requirement of Section 275 of the defendant's Medicaid policy which required the woman-recipient's prior written consent to the abortion, is contrary to the holding of this Court in the recent case of *Planned Parenthood of Central Missouri* v. *Danforth*, 44 U.S.L.W., 5197 at 5201, (June 29, 1976), that ". . . such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement."

Consequently, this Court should reverse the holding of the district court and allow Connecticut to re-implement the policy of Section 275 of its Medicaid regulations.

ARGUMENT

I. The Failure To Include, Under Connecticut's Title XIX Medical Assistance Program, A Provision For The Payment Of The Cost Of An Elective Abortion Does Not Infringe Upon The Exercise, By The Plaintiffs Herein, Of A Constitutionally Protected Fundamental Right.

A. THE BASIS OF THE LOWER COURT DECISION

The reasons for the District Court's decision are contained, essentially, in the following portion of the Memorandum of Decision:

"The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion. [footnote omitted]

"When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); cf. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972)."

408 F. Supp. 660, at 663; Memorandum of Decision, (Juris. statement, p. 18 at 20).

B. CONNECTICUT'S MEDICAID PROGRAM DOES NOT DISCRIMINATE AGAINST ABORTION

Connecticut has always limited the coverage under its Title XIX Medicaid program (as initially it believed was required by federal law) to providing payment thereunder for services which are medically necessary for the patient's health. Earlier in this litigation, on appeal from the single-judge district court, the Second Circuit held, in interpreting the federal

statute (42 U.S.C. § 1396 *et seq.*) that, under Title XIX, a state *may* include payment for an elective abortion under its Medicaid program but it is not *required* to do so. Connecticut, thereafter, elected *not* to include a provision for payment, under its program, for elective abortions, but to continue to pay thereunder for therapeutic abortions which were so certified by the patient's attending physician.

The quotation from the district court's opinion cited above is an incomplete summation as to how both abortion and pregnancy are treated under Connecticut's Medical program. First of all, it should be kept in mind that Connecticut has no program, *as such*, for providing payment for abortions. Secondly, Connecticut has *not* chosen to establish a medical program for reimbursing *all* of the medical expenses of the indigent, but only those medical expenses which are medically necessary for the patient's health. Finally, Connecticut, as part of its medical program, provides payment thereunder for medical expenses arising from *pregnancy* only to the extent that those medical services are necessary for the patient's health — the same limitation upon payment which applies to payment for *abortion* under the program.

Applying this analysis to the portion of the district court's opinion, quoted above, that paragraph can be edited to read as follows:

> "When Connecticut [under its Medical program] refuses to fund elective abortions [which are *not* medically necessary for the patient's health] while funding therapeutic abortions and prenatal and postnatal care [which *are* medically necessary for the patient's health], it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion."

The conclusion of the district court that "it weighs the choice . . . against choosing her . . . right to an elective abortion" now appears to be a *non sequitur*, since it has become apparent that the funding is restricted to providing payment for medical services which are medically necessary for the patient's health; and that payment for abortion, when it occurs, is only incidental to the program's purpose of providing medically necessary care.

In arriving at its decision, the District Court has mistaken the focus of Connecticut's Medicaid program — that focus is neither upon pregnancy nor abortion. It is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. The court overlooked the fact that not only does the state's medical program exclude payment for elective abortions, it also excludes all other non-medically necessary medical care, including non-medically necessary prenatal or postnatal care.

A state regulation which attempted to *exclude* from coverage under Medicaid an abortion which *was* medically necessary for the patient's health might well run afoul of the equal protection clause as an invidious discrimination. That is not the case here. Connecticut makes no invidious discrimination against abortion under its Medicaid program.[3]

The invidious discrimination claimed, implicitly, by the lower court, to be present in Connecticut's policy[4] was the

[3]From July 1, 1973 through June 16, 1974, payment was made for a total of 1,410 abortions under Connecticut's Title XIX program. *Answers To Plaintiffs' Second Interrogatories*, question 8, (A. 13, 14).

[4]Nowhere in its opinion did the lower court state *explicitly* that there was invidious discrimination present under Connecticut's Medicaid abortion policy. However, the court's conclusion that

premise upon which the lower court founded its conclusion that Connecticut "thus infringes upon a fundamental interest" (Juris. statement 21). When that foundation is removed, there remains only a naked claim that the failure, by itself, to fund the cost of an elective abortion results in an infringement upon the plaintiffs' fundamental right(s).

In support of its opinion, the district court has cited the cases of *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Each of those cases involved the constitutionally protected fundamental right to travel. In *Maricopa*, an Arizona statute requiring one year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care[5] was held to create "an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities' of life." In *Shapiro*, a Connecticut statute imposing a one year residency requirement was struck down because it imposed a condition upon welfare applicants which impinged upon their constitutional right to travel freely from state to state. In *Dunn*, the Court held that Tennessee may not burden the right to travel by imposing a durational residency requirement of one year in the state and three months in the county in order to be eligible to vote.

The fundamental right involved in each of those cases was the right to travel. In the instant case the fundamental right

Connecticut *"weighs the choice* of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion" (juris. statement 20) (emphasis added) must, the defendant-commissioner believes, be regarded as tantamount to such a claim.

[5]It may be noted in passing that although the medical care withheld under the Arizona residency requirement was "nonemergency", it was undoubtedly, unlike that involved in the instant case, *necessary* medical care. ". . . the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness . . ." 415 U.S. 259-260.

involved is "a woman's constitutional right of personal privacy," encompassing "the unfettered right to terminate a pregnancy through an abortion performed by a licensed physician during the first trimester of pregnancy" (Juris. statement 19-20), as enunciated in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

In *Maricopa* and *Shapiro*, the durational residency requirement impinged upon the plaintiffs' right to travel by *preventing* them from receiving nonemergency medical care, in the former case, and public welfare benefits in the latter. In *Dunn*, the plaintiff's right to travel was impinged upon by depriving him of the right to vote. In the instant case, no comparable interference results from Connecticut's Medicaid policy on payment for abortion. There is nothing in the Connecticut regulation which prevents a woman from making a choice to have an abortion. Of course, once that choice has been made, if the woman is indigent, she must now look for a source of funds with which to pay the cost of the abortion. The physicians in the instant case were, apparently, in such difficult financial circumstances themselves that they could not permit their patients to pay for the service over a period of time. But under *Roe*, an indigent woman was *not* given *an additional fundamental right* to have an abortion paid for from public funds. A decision of that nature is the prerogative of the legislature.

The district court, in this case, has, nonetheless, held, in effect, that Connecticut's failure to affirmatively appropriate and provide public funds to an indigent woman for payment of the cost of an abortion *is* an interference with the fundamental right announced in *Roe* v. *Wade, supra*. The defendant-commissioner believes there is no constitutional authority to support such a decision.

C. A STATE IS NOT REQUIRED TO FUND THE COST OF THE EXERCISE, BY AN INDIGENT, OF A CONSTITUTIONAL RIGHT

If then, as the defendant-commissioner has contended above, Connecticut's policy on payment for abortion under its medicaid program does *not* infringe upon a fundamental interest (since there is no invidious discrimination involved), the lower court's decision is tantamount to a claim that if Connecticut chooses to provide its public funds (in conjunction with federal funds) to relieve one of the hardships caused by indigency (the lack of adequate medical care) it must also provide public funds to relieve other hardships caused by indigency, at least insofar as the exercise of a fundamental constitutional right is involved.

Stated in simpler terms, the district court's decision would require a state to finance the cost of the exercise of an indigent's fundamental constitutional right. Previous decisions of this Court do not support such a proposition.

In *Helvering* v. *Davis*, 301 U.S. 619 (1937), the Supreme Court indicated that such a decision does not lie with the courts, when Justice Cardozo commented therein as follows:

> "Congress may spend money in aid of the 'general welfare.' [citations omitted] There have been great statesmen in our history who have stood for other views.
>
> We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra*. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of

Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law."

301 U.S. at 640.

In *Doe* v. *Wohlgemuth*, 376 F. Supp. 173 (1974), *modified*, 523 F.2d 611 (3rd Cir., 1975) a three-judge district court held that a Pennsylvania Medicaid regulation, which also excluded payment for a non-therapeutic abortion, was unconstitutional.[6] But in that case even the majority opinion concluded by stating:

"We do not hold that the state must finance a fundamental right, but we do hold that the expression of that

[6]Pennsylvania's Medical Assistance Program imposed more extensive restrictions on payment for abortion than did Connecticut's program. Before payment would be made for an abortion, Pennsylvania required that (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat of the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. *Doe* v. *Beal*, 523 F.2d 611, 613, 614.

fundamental right cannot be the basis for invidious discrimination."

376 F.Supp. at 192.

In a dissenting opinion in that case, Judge Weis stated, *inter alia:*

". . . Thus the question here is not whether the state may prohibit certain categories of abortion. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary and non-necessary abortions offend the Equal Protection Clause.

"That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin* v. *Illinois*, 351 U.S. 12 . . . (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie* v. *Connecticut*, 401 U.S. 371 . . . (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. . . .

". . . [A] scrutiny of representative Supreme Court determinations on the 'fundamental' right classification, including those in the right to privacy category, demonstrates no corollary of required State subsidy.

"While *Shapiro* v. *Thompson*, 394 U.S. 618 . . . [footnote omitted] found the right to travel among states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

"While a person may have a fundamental right of privacy to have obscene material in his home, *Stanley* v. *Georgia*, 394 U.S.557, . . . (1969) . . . there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to purchase public address systems or printing presses for those unable to pay for them."

376 F.Supp. at 193-194.

Griffin v. *Illinois*, 351 U.S. 12, (1956) referred to by Judge Weis, *supra*, (requiring that an indigent criminal defendant be furnished transcripts at state expense), and *Douglas* v. *California*, 322 U.S. 353 (1963) (which required the appointment of counsel for indigents on their first appeal of right) were cases involving financial barriers in criminal cases. Nonetheless, the decision in both those cases was based upon a denial of equal protection, not due process, with Justice Harlan dissenting in *Griffin*, 351 U.S. at 29, and *Douglas*, 372 U.S. 360, because he believed that due process should apply. In *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), (requiring the State to waive its divorce filing fee for indigent applicants) Justice Harlan wrote the opinion for the Court in which due process was held to be the appropriate standard upon which to determine the validity of financial barriers limiting access to the courts. This Court subsequently declined to extend the holding of *Boddie* in *United States* v. *Kras*, 409 U.S. 434 (1973), when it upheld a $50.00 filing fee in bankruptcy proceedings, and in *Ortwein* v. *Schwab*, 410 U.S. 656, (1973), when Oregon's

$25.00 filing fee for judicial review of administrative proceedings in welfare cases was upheld. The Court refused thereby to enlarge the areas in which financial barriers to indigents would be lowered.

It is submitted that the prior decisions of this Court do not support the proposition that a State is required to fund, for an indigent person, the exercise of a constitutional right. The reasoning of the District Court in this respect is contrary to the weight of constitutional authority.

D. ONLY A "RATIONAL BASIS" NEED EXIST FOR CONNECTICUT'S MEDICAID REGULATION REQUIRING THAT AN ABORTION BE MEDICALLY NECESSARY FOR THE PATIENT'S HEALTH

The District Court in this case has held that since, in its view, the State's Medicaid regulation regarding payment for abortion interferes with the exercise of a fundamental right, Connecticut must demonstrate that there is a compelling state interest which is being served for the regulation withstand judicial scrutiny, citing *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972).

But if, as the appellant has claimed herein, *supra*, abortion is not the subject of invidious discrimination under Connecticut's medical program; and, if, as is also contended, a State is not required to fund the exercise of an indigent's constitutional right, then there is no interference by the defendant with plaintiffs' fundamental right to have an abortion. The issue involved is, instead, the plaintiffs' right to receive medical welfare benefits. That right has never been held to be a fundamental one. In determining whether there is a violation of the Equal Protection Clause in such a case, Connecticut's regulation is subject only to the "rational basis" test set forth in *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

In *Doe* v. *Beal*, 523 F.2d 611 (1975), the Third Circuit, sitting *en banc*, held that Pennsylvania's Medical Assistance Program regulations and procedures, as they apply to reimbursement for abortions were invalid because they were inconsistent with Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. It was therefore unnecessary for that court to reach the constitutional issues.[7] However, in a dissenting opinion in that case, Judge Kalodner (with Judge Adams concurring therein) did comment on the holding of the district court which held that the Pennsylvania regulations were "unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." *Doe* v. *Wohlgemuth*, 376 F.Supp. at 191.

The lower court in that case had held that Pennsylvania must show a compelling reason for limiting payment for abortion under its Medical Assistance Program to situations requiring necessary medical care. In his dissent, Judge Kalodner stated *inter alia:*

> "The cornerstone of the plaintiffs' contention is that the Regulations, in the *absence of a compelling state interest,* violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes* — one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.
>
> "The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program

[7]Of course in the instant case, the 2nd Circuit reached a contrary result. 522 F.2d 928 (1975); as did the 5th Circuit in Roe v. Ferguson, 515 F.2d 279 (6th Cir., 1975).

has committed itself to extend medical care to its eligibles only where *'necessary medical care' is required.*

The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the 'compelling state interest' test. It is subject only to the 'reasonable basis', otherwise stated, 'rational basis' test, spelled out in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970). There, the Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485, 90 S.Ct. at page 1161:

> 'In the area of economics and *social welfare, a* State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification* 'is not made with mathematical nicety or because in practice it *results* in *some inequality.' Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 55 L.Ed. 369]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 [33 S.Ct. 441, 57 L.Ed. 730]' (emphasis supplied).

"I am of the opinion that the classification between 'necessary medical care' and 'non-necessary medical care' survives the application of the 'reasonable basis' and/or 'rational basis' tests."

523 F.2d, at 633.

In some of the Court's recent opinions, an intermediate level of scrutiny — neither the strict level of the compelling state interest test nor the minimal level of the rational basis test — has been employed. This was the case, for example, in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). And in *Chicago Police Dept* v. *Mosley*, 408 U.S. 92, 95 (1972), the test announced by the Court in finding a denial of equal protection in an ordinance which exempted peaceful labor picketing from its ban on picketing near school buildings was whether there is "an appropriate governmental interest suitably furthered by the differential treatment."

Even if this so-called "means-oriented" scrutiny is applied to the restriction on payment for abortion in the instant case, Connecticut's regulation will pass muster, since there is a state governmental interest present which is suitably furthered by the limitation against payment for an elective abortion. That interest is the need of the State to control the amount of its limited public funds which will be allocated to its public welfare budget.

In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), a case in which this Court struck down a Massachusetts criminal statute under which the defendant had been convicted for dispensing contraceptives, the Court indicated that all that needed to be shown to uphold the statute was that the means were "rationally related to a valid public purpose" and that it was not required that they be "necessary to the achievement of a compelling state interest" *Id.* at 447, n.7. But despite this indication, the Court inquired closely into the purposes articulated by Massachusetts for the enactment of the statute, and disbelieved and rejected two of the proferred reasons — rather than, as under the McGowan test, conceiving of a set of circumstances which would uphold the validity of the statute.

Eisenstadt bears a similarity to the instant case in at least one respect. The district court also disbelieved the reasons articulated for the adoption of Connecticut's Medicaid policy on payment for abortion. Those reasons were:

> 1) "the necessity to limit state funds in the welfare field."
>
> 2) ". . . the State has a right to limit its Medicaid program expenditures, particularly where [as here] . . . a service which is being sought to be included for payment that is not medically necessary, . . . [A]ll the more so when . . . the State does not pay . . . for some medical services which are medically necessary because of the prohibitive costs . . .
>
> ". . . if this Court were to rule that the State must pay for services . . . not required for the patient's health, it . . . seems . . . there would be no way to exclude services which are necessary . . . and no way to exclude any service performed by a physician, including . . . cosmetic surgery . . ." *Transcript of Proceedings* (R. 54, 25-27).

The lower court rejected the proferred reasons out of hand, in the absence of any evidence in the record to the contrary. The district court said it would be cheaper, at least in the long run, for the State to provide payment for an indigent's elective abortion. *Memorandum of Decision*, Juris. statement, 18 at 21. (Of course, Connecticut is *presently* faced with a fiscal crisis and appears to be more concerned with the short-run aspects of its problem.) The district court also speculated upon the wisdom of the state's policy when it stated:

> "Furthermore, the birth of a child to a welfare mother increases the burden on the state's welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance [footnote omitted]. The

state's assertion that it saves money when it declines to pay the cost of a welfare mother's abortion is simply contrary to undisputed facts." *Memorandum of Decision, Id.*, at 21.

Precisely which "undisputed facts" the district court was here referring to is uncertain. This was, after all, a hearing on the plaintiff's motion for summary judgment. The defendant-commissioner certainly did dispute the "undisputed facts", if, by that term, the district court meant that the policy of limiting expenditures under the Medicaid program to medically necessary services would not help to conserve the state's limited fiscal resources.

Of course, there are many unstated assumptions in the district court's hypothesis, but even if we were to concede the accuracy of the district court's conclusion in this respect, that is a judgment not of the legality of the policy but, rather, of its wisdom. It is not the function of the courts to judge the wisdom of legislative enactments[8] but only to pass upon their legality.[9]

In the instant case, the district court, in effect, applied what amounted to an inversion of the rational basis test of *McGowan*. Rather than upholding Connecticut's Medicaid regulation "if any state of facts reasonably may be conceived to justify it," the Court appeared to believe it should strike down the Connecticut regulation if a state of facts reasonably could be conceived to invalidate it. Of course, the lower court did not consciously apply any such standard but the result was the same.

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[8]Or, as in this case, the adoption of a policy by an administrative agency as a result of a delegation of power from the legislature.

[9]See *Helvering* v. *Davis*, 301 U.S. 619, 644 (1937).

When a governmental interest is articulated which does in fact further a declared purpose, a court should not then attempt to determine whether, in fact, a member or members of the legislative or executive branch might privately harbor an unstated secondary (or, for that matter, even a primary) reason(s) for its action which the court may consider ignoble or sinister. Yet, this apparently is what the lower court did in this case. The need of the state to limit its public welfare expenditures is a proper and necessary function of government. Limiting, without invidious discrimination, the scope of the services for which payment would be made under Connecticut's Medicaid program would, without question, limit the cost of such a program. In *Eisenstadt*, this Court demonstrated by compelling logic that Massachusetts' articulated purposes for the enactment of the statute did not and could not achieve the proclaimed goals of the legislation.[10] In the instant case, unlike *Eisenstadt*, the district court could make no comparable logical refutation of the professed reasons for the adoption of Connecticut's Medicaid abortion regulation, because the means adopted were rationally related to a valid public purpose. A court judgment rendered under such circumstances is one founded upon a fragile framework of surmise and conjecture. It harkens back to an earlier time.

The imputing, by the courts, of unarticulated reasons for enactment of legislation was an apparent concern of Mr. Chief Justice Burger in *Eisenstadt*, *supra*. In a dissent in that case he stated, *inter alia:*

> "It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this

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[10]See *Eisenstadt* v. *Baird*, 405 U.S. 438, 447-452.

Court to dismiss as dubious a state court's explication of a state statute absent overwhelming and irrefutable reasons for doing so."

405 U.S. 438 at 468.

Mr. Justice Harlan had previously warned the courts against attempting to divine subjective legislative and executive motivations in *Rosado* v. *Wyman*, 397 U.S. 397, (1970), when he stated:

"We reach our conclusions without relying on the finding made by the court below that in § 131-a New York was *attempting* to constrict its welfare payments. Speculation as to legislative and executive motive is to be shunned. - - -" [emphasis in original]

397 U.S. 419.

The action of the lower court amounted to an attempt to alleviate a hardship suffered by the plaintiffs as a result of their indigency. Mr. Justice Douglas stated in his dissent in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, (1974), (to which is appended: "Gourmand And Food — A Fable"), that were it not for the presence of invidious discrimination in that case:

"The political processes [footnote omitted] rather than equal protection litigation are the ultimate solution of the present problem [of the legal and economic aspects of medical care]."

415 U.S. at 272.

As a legal commentator has recently observed:

". . . the dangers of [judicial] intervention [in existing public benefit programs] are apparent. One is that, in

voiding public welfare classifications, courts engage in what is indisputably the most basic of all legislative functions — from and to whom to raise and distribute revenue. For the very essence of politics is often simply a matter of who gets and who pays.

• • •

". . . [W]hen extended sufficiently, judicial reduction of economic disparities reduces politics almost to a nullity. It is difficult to see how one's vote means anything if it is not a broad entrustment to legislatures of the power to raise and disburse according to the wisdom of their priorities, the public funds."[11]

That same commentator goes on to make some observations that are an apt summation of the problem confronting the Court in this case:[12]

"That inequalities of means remain a matter of legislative wisdom is deeply argued. America has long looked most ambivalently at the status of poverty. Is it a state of helplessness before crushing obstacles or rather a condition escapable under the discipline of self-betterment? Does it represent indolence, disability, or a string of irreversible past hard knocks and circumstances? Is assistance "used" or squandered? Does aid promote or undermine an effort at personal improvement? Are the claims of the poor on public funds their just due or a taking of others' efforts? What, one may ask to sum it up, gives one an innate claim to public funds? The anguished and elemental philosophical difficulty of this question parallels the ambiguities in the state of poverty itself, simultaneously calling for

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[11]Wilkinson, The Supreme Court, The Equal Protection Clause, And The Three Faces Of Constitutionality, 61 Va. L.R. 945, 1010-1011, (June, 1975).

[12]Wilkinson, *Id.*, 1016-1017.

sympathy and realism. For the judiciary to pre-empt such legitimate debate with judgment on one side — albeit the allegedly compassionate one — is to replace with self-righteous fiat an ancient dilemma that should be thought and argued out among the people themselves."

Appellant submits that, in determining whether plaintiffs had been denied equal protection, it was error for the District Court to apply the "compelling state interest" test to Connecticut's Medicaid regulation. Prior decisions of this Court indicate that in the area of economics and social welfare the appropriate test to be applied is the "rational basis" test of *Dandridge* v. *Williams, supra,* which has been reiterated in *Jefferson* v. *Hackney,* 406 U.S. 535, 546 (1972); and *Richardson* v. *Belcher,* 404 U.S. 72, 80-81 (1971).

II. On A Motion For Summary Judgment, It Was Improper For The District Court to Enjoin The Defendant-Commissioner's Requirement That Prior Approval Be Obtained Before Payment Would Be Made For An Abortion, Since There Was A Disputed Question Of Fact On This Issue.

Under Connecticut's Medicaid program, prior authorization must be obtained from the Department of Social Services before payment for an abortion will be made. This requirement of prior approval is not applicable to physician's services rendered for prenatal and postnatal care. There are, however, many medical services provided under Connecticut's program which also require that prior approval be obtained before payment will be made. Among these are, for example, all dental services other than those of an emergency nature,[13] podiatry services,[14] prosthetic devices,[15] and physical therapy.[16]

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[13]See Connecticut Department of Social Services Manual, Volume III, Chapter III, Index 215 (R. 1).
[14]*Id.*, Index 220.1-220.11
[15]*Id.*, Index 280.1
[16]*Id.*, Index 282

Plaintiffs filed affidavits in support of their motion for summary judgment (A. 36 at 38, 56 at 58, 60 at 61, 63 at 65) in which it was claimed that the Department's prior approval procedures causes unnecessary delay and interference with the immediate performance of an abortion. The defendant-commissioner filed a counteraffidavit disputing these claims, and indicating that in any case in which the attending physician believed that a delay would pose an increased risk to his patient, oral approval, by telephone, could be obtained from the Department. (A. 17). The defendants had also indicated that the average time lapse between receipt of a request for prior approval in the office of the welfare department to the time approval was mailed out to the initiating party was approximately three days. *Answers to Interrogatories,* question 4, (A. 10).

The defendant-commissioner had also filed a motion to strike the affidavits (A. 15) submitted by the plaintiffs with their motion for summary judgment on the ground that the evidence contained therein was inadmissible and in contravention of Rule 43(a) of the Federal Rules of Civil Procedure which requires that testimony of witnesses be taken orally in open court.

In an *amicus* memorandum submitted at an earlier phase of this action, at the request of the U.S. Court of Appeals (2d. Cir.), HEW indicated that "a reasonable prior authorization expeditiously handled would not be inconsistent with Title XIX" and ". . . indeed, where a state wishes to ensure that limited resources will be used only for medically necessary procedures, a requirement of prior approval for Medicaid payments may be the most efficient way of administering the program in the best interests of the recipient." (A. 72).

Therefore, it was improper for the district court to enjoin the defendant-commissioner's requirement that prior approval

be obtained before payment would be made for an abortion under the Connecticut Medicaid program, since there was a disputed question of fact on this issue.

III. The District Court Improperly Struck Down The Requirement That, Before An Abortion Would Be Paid For Under The Title XIX Medicaid Program, The Recipient-Applicant's Prior Written Consent Must Be Obtained.

> The district court also ruled in its opinion (A. 23) that: "Similarly, § 275's requirement that evidence of the patient's consent be presented to the state prior to a first-trimester abortion furthers no legitimate state interest that justifies the distinction between abortions and other medical responses to pregnancy." [footnote omitted] This ruling is contrary to this Court's recent holding in Planned *Parenthood of Central Missouri* v. *Danforth*, 44 U.S.L.W. 5197 at 5201, (June 29, 1976).

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the district court and allow Connecticut to re-implement the policy of Section 275 of its Medicaid regulations.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1440

EDWARD W. MAHER, COMMISSIONER OF SOCIAL SERVICES OF THE STATE OF CONNECTICUT,

Appellant,

v.

SUSAN ROE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
Cases	
Statutes	
Other Sources	
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. THE STATE CANNOT DENY PUBLIC ASSISTANCE TO THOSE WHO CHOOSE TO EXERCISE A CONSTITUTIONAL RIGHT	13
II. THE STATE DENIES EQUAL PROTECTION OF THE LAW WHEN IT REFUSES MEDICAID PAYMENT FOR ELECTIVE ABORTION	15
III. CONNECTICUT IMPOSES A SIGNIFICANT BURDEN ON WOMEN WHO CHOOSE ELECTIVE ABORTIONS, WHICH IS PERMISSIBLE ONLY TO FURTHER A COMPELLING STATE INTEREST	20
A. Defendants Cannot Require That an Abortion be Necessary to the Patient's Health	21
B. Defendants Cannot Require Prior Authorization for the Performance of an Abortion	29
C. Defendants Cannot Require Prior Submission of the Patient's Consent as a Condition for Reimbursement for Abortion	32
CONCLUSION	34

TABLE OF AUTHORITIES

Cases: *Page*

Bellotti v. Baird, ____ U.S. ____, 49 L.Ed.2d 844 (1976) 21

Boddie v. Connecticut, 401 U.S. 371 (1971) 16

Dandridge v. Williams, 397 U.S. 471 (1970) 21,28

Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*

Doe v. Ceci, 517 F.2d 1203 (7th Cir. 1975) 19

Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974) cert. den. 420 U.S. 907 (1975) 19

Doe v. Mundy, 514 F.2d 1179 (7th Cir. 1975) 19

Doe v. Myatt, No. 4-74 Civ. (D. Minn. August 1, 1975) 19

Doe v. O'Bannon, No. 4-74 Civ. 69 (D. Minn. August 1, 1975) 18

Doe v. Poelker, 497 F.2d 1063 (8th Cir. 1975) cert. granted 49 L.Ed.2d 1216 (1976) No. 75-442 19

Doe v. Rampton, 366 F. Supp. 189 (D. Utah, 1973) 19

Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974) 18

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Page

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1440

EDWARD W. MAHER, COMMISSIONER OF SOCIAL SERVICES OF THE STATE OF CONNECTICUT,

Appellant,

v.

SUSAN ROE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The three judge district court in this case has declared unconstitutional and enjoined the enforcement of a regulation of the Connecticut Department of Social Services prohibiting Medicaid, or state medical assistance, for elective abortions and requiring prior

authorization and the prior consent of the patient for any abortion for which medicaid reimbursement is sought. The challenged regulation,[1] set forth in full in the Joint Appendix at 7, provides that medicaid shall be available for abortion services only when the abortion is "medically necessary." When a medicaid recipient seeks to obtain abortion services, the following must occur:

1. The hospital or clinic where the abortion is to be performed must submit in advance a request for certification for reimbursement for abortion (Form W-217, A. 47), which reads:

> "I hereby certify that (name of patient) has requested performance of an abortion. She is in the first trimester of her pregnancy. As attending physician it is my opinion that performance of this abortion is medically necessary for the patient's health. This abortion will be performed at (hospital) on (date)."
>
> s/ Attending Physician[2]

[1] §275, Connecticut State Department of Social Services, Medical Assistance Program, Manual, Vol. 3, Chapter III. This regulation is promulgated as part of Connecticut's medical assistance program, for which the State is partially reimbursed by the federal government under 42 U.S.C. §1396 *et seq.*, or Title XIX of the United States Social Security Act. All persons eligible for Aid to Families with Dependent Children (AFDC) are eligible for medicaid. 42 U.S.C. §1396(a).

[2] For second trimester abortions, the Chief of Obstetrics and Gynecology must certify that the abortion will be performed in a hospital and that the attending physician is privileged to practice at that hospital. Form W-217a. This part of the regulation is not now before the Court. cf opinion below. 408 F. Supp. 660, 665 fn. 6 (D. Conn. 1975) Memorandum of Decision, Juris. Statement, 18 at 25.

2. The hospital must submit in advance a Request for Authorization for Professional Services, Form W-601. (A. 45) This form must "include a statement indicating the medical need for the abortion." §275. (A. 8) Both forms, plus the written request of the patient are sent to the Department of Social Services.

> ". . . [T]he request will be reviewed by competent medical authority in the Division of Health Services in Central Office, and the hospital or clinic will be notified of the Department's decision by returning two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files."

§275. (A. 8) Payment for abortion will be made only when this prior authorization is obtained from the Chief of Medical Services, Division of Health Services, Department of Social Services. §275, (A. 7)

There is no medical service other than abortion for which the defendants require a certification of medical necessity signed by the attending physician and the Chief of Service. (Ans. to Plaintiffs' Interrog. 9B). Forms W-217 and W-217a are unique to abortion. Nor is there any other service for which a physician is required to certify in advance that a patient has requested or consented to treatment. Similarly, there is no other procedure for which a chief of staff must certify to an attending physician's hospital privileges.

As part of its medicaid program, Connecticut provides comprehensive pre-natal, obstetrical and post-natal care for pregnant eligible recipients. For these services, and generally for the vast majority of physicians' and hospital services paid for by medicaid, a physician or hospital performs the services, and subsequently submits a form W-285, (A. 46) stating the services rendered, the diagnosis

and the fee. No prior authorization is required for any form of reproductive health care, or other pregnancy-related disability, aside from abortion.[3]

Nor is it required for any hospital procedure requiring a stay of less than ten days nor for any surgical

[3]Prior authorization is required only for certain services which involve long term treatment, are extremely costly, or are rehabilitative or custodial in nature:

(1) Dental care other than emergency care or routine low-cost care in a state-aided hospital clinic. Manual Vol. 3 Ch. III §215.

(2) Drugs costing over $10.00 and certain multi-vitamins. Manual §217.2(3).

(3) Prosthetic, surgical and orthopedic applicances and sickroom supplies costing over $5.00. Manual §220.11.

(4) Hearing aids and aural rehabilitation. Manual §222.

(5) Non-emergency transportation by ambulance, chair-car or taxi. Manual §223.

(6) Day treatment services. Manual §265.

(7) Certain services for the mentally retarded. Manual §270.03.

(8) Certain unusual optometric services. Manual §280.

(9) Podiatry services. Manual §280.1.

(10) Physical therapy services. Manual §282.

(11) Public health nursing services. Manual §282.

(12) Home Health Aid Services, over 12 hours a week. Manual §229.13.

(13) Hemodialysis. Manual §230.

(14) Psychological tests and treatment and diagnostic services. Manual §252.

(15) Care in certain voluntary non-profit clinics. Manual §253.

(16) Special nursing services. Manual §301.43.

(17) Out-of-state hospitalization. Manual §302.

(continued)

procedures except transplant and cosmetic surgery, which are understandably *sui generis*. In their answers to interrogatories defendants claimed that prior authorization is required for a tubal ligation, (Ans. to Interrog. 10A.4), but this requirement is not documented in any of the regulations furnished in response to said interrogatories. (Ans. to Interrog. 10D). As the Affidavit of Sandra Sereque (A. 44) points out, reimbursement for tubal ligation is provided when W-285 is submitted subsequent to the operation and without any request for prior authorization.

Connecticut also provides comprehensive family planning services under 42 U.S.C. §1397 *et seq.*, Title XX of the Social Security Act. Abortion is now currently being provided under this section, which carries a higher rate (90%) of federal reimbursement for state expenditures than does Title XIX. Yet no prior authorization or proof of necessity is required for any other birth control or contraceptive service. (Ans. to Interrog. 10A.8)

Plaintiff-appellees are all women who do not themselves have the funds to obtain abortion or any other medical services. As recipients of public assistance they must look

(footnote continued from preceding page)

(18) Certain private psychiatric treatment. Manual §315.

(19) The following physician's services:

Psychiatric services
Audiological services
Orthopedic treatment
Physical therapy
Hemodialysis

Special procedures:

Transplant operations
Cosmetic or Reconstructive surgery
Chemotherapy

to government agencies for the costs of medical care. A class of pregnant women eligible for medicaid who have been refused payment for abortions which they have requested and which have been approved by their physicians, was certified by the District Court, 388 F. Supp. at 730. (Memorandum of Decision. Juris. Statement at 25.)

Plaintiff Susan Roe was pregnant when the action was originally filed. She was unmarried and the mother of three children. One of these was a six month old boy who was in poor health. Ms. Roe felt she could not adequately care for both an infant and her son, who required careful supervision lest he become ill. Affidavit in Support of Motion for Temporary Restraining Order, (A. 20-21). Plaintiff Roe's physician, Dr. James Kauders, did not submit an attestation of medical necessity, because "[He did] not believe [an abortion] is medically necessary in the sense that her life or health will be threatened if the abortion is not performed." Affidavit in Support of Motion for Temporary Restraining Order. (A. 22-23).

Plaintiff Poe was sixteen years old and a high school junior when she became pregnant in September, 1973. She was in excellent health, and she desired an abortion so that she could complete high school, obtain a job, and terminate her dependence on public assistance. Affidavit in Support of Motion for Temporary Restraining Order. (A. 24-25) and Affidavit of Linda Poe, (A. 49-50). She underwent an abortion at Park City Hospital in Bridgeport, Connecticut, but the State Welfare Department refused to authorize medicaid payment for that procedure. Plaintiff Poe's mother attempted to pay for the abortion but could not because she herself was dependent upon Aid to Families with Dependent

Children. When this action was commenced she owed the hospital $244.20. This plaintiff has since entered Sacred Heart University and obtained part-time employment. (A. 50) Park City Hospital tried to obtain prior approval for Plaintiff Poe's abortion from the Department of Social Services and approval was denied. Affidavit of Sandra Sereque, Manager of Patient Accounts, Park City Hospital. (A. 39-40)

Plaintiff Barbara Bye was eighteen years old, divorced, and had a two and one-half year old daughter when she asked for a temporary restraining order to obtain an abortion under medicaid. She and her daughter were completely dependent on public assistance from the State of Connecticut for all of their needs. She was in her sixth week of pregnancy and did not wish to bear an illegitimate child, but there was no medical reason why she should not carry her pregnancy to term. Affidavit of Barbara Bye. (A. 26-27) Ms. Bye consulted Dr. James Kauders, who concurred in her decision to undergo an abortion, but informed her that he could not certify that the abortion was necessary for her health, that, therefore, medicaid would not pay the costs, and that she would have to pay the full costs of confinement in Park City Hospital and of his services before he could perform the operation. Affidavit of James Kauders, M.D. (A. 28-29)

Plaintiff Carol C. was eight weeks pregnant when she consulted Dr. Eugene Corley of Bridgeport and requested that he perform an abortion. She was divorced, and the mother of three children, ages 6, 7 and 9. For the past year she had worked as a visiting nurse's aid and was attempting to complete her nursing education so that she could end her dependence on public assistance. With a new infant to care for, she would have had to leave her job and postpone her further education for several years.

Affidavit of Carol C. (A. 30) Dr. Corley concurred in her decision to undergo an abortion, but indicated that he could not schedule her for one until she found some means of payment independent of medicaid. In his affidavit, Dr. Corley stated that:

> "I cannot certify to the Department of Social Services that Ms. C's abortion is medically necessary to her health, without violating medical ethics."

Affidavit of Eugene Corley, M.D. (A. 32-33)

Plaintiff Debbie D. also consulted Dr. Eugene Corley and discovered she was pregnant. She was unmarried and had a six month old child. A student at Bassick High School in Bridgeport, she was attempting to finish high school while caring for her young child. She could not have done so with another infant to care for. Affidavit of Debbie D. (A. 34-35) Dr. Corley found that there would be no danger to Ms. D's health in carrying her pregnancy to term, so that he could not certify to medical necessity. Affidavit of Eugene Corley. (A. 32-33)

Both Dr. Kauders and Dr. Corley stated by Affidavit that they could not certify to medical necessity unless a full term pregnancy would involve some unusual danger to the health of the patient. Dr. Joseph Horowitz, Chief of Obstetrics and Gynecology at Park City Hospital, with which both Dr. Kauders and Dr. Corley are affiliated, also gave an affidavit in support of plaintiffs' first Motion for Summary Judgment. In it he said:

> "[5] It is my professional opinion that the terms "medically necessary . . ." and "medically necessary for the patient's health . . ." refer to situations in which the attending physician believes there will be an adverse effect upon the physical or mental condition of the patient if the pregnancy is carried to term."

> "[6] When a patient determines that she does not wish to bear a child for personal reasons, and there is no medical reason why she should not carry her pregnancy to term, I cannot attest that an abortion is medically necessary for the patient's health, without violating my professional code of ethics."
>
> "[7] I will, therefore, not fill out forms W-601, W-217 or W-217a in a case where a patient desires an abortion only for personal or family planning reasons, and I would instruct members of my staff not to do so in similar circumstances."
>
> "[8] An abortion for family planning reasons is, of course, medically necessary in order to terminate an unwanted pregnancy, in the same sense as other forms of obstetrical care are medically necessary when a patient decides to carry a pregnancy to term."

Affidavit of Joseph Horowitz, M.D. (A. 16-38)

All three physicians stressed in their affidavits that an abortion should be performed as early in pregnancy as possible since the risks to the patient increase as the fetus develops. It is, therefore, standard medical procedure to perform an abortion whenever possible before the twelfth week of gestation, and in any case as early as possible. Abortion is an emergency procedure if the woman is close to or beyond the twelfth week of pregnancy – and, in practice, legal abortions at Park City Hospital are scheduled within a few days of a staff member's request. However, when the patient is a public assistance recipient, the hospital informs her that the State will not reimburse it for her abortion and that she must, therefore, find some other means of payment. Affidavit of Sandra Sereque. (A. 39-40) The abortion is then either put off entirely, delayed while the patient attempts to borrow the necessary funds, or performed

by non-licensed non-medical person, at great risk to the patient.

Mrs. Sereque also indicated, by affidavit, that there was an average time lapse of two weeks between her submission of request for prior authorization and the return to her of the response of the Department of Social Services. (A. 40) Four physicians stated in affidavits that abortion must be performed as early in pregnancy as possible, because the risk of complication increases with each day. The delay imposed by the prior authorization requirement thus interferes *per se* with good medical practice. Affidavits of Gordon Jonas, M.D., (A. 63 at 65), Eugene Corley, M.D., (A. 60 at 61-2), Joseph Horowitz, M.D. (A. 56) and James Kauders, M.D. (A. 22-23) and (A. 28-29)

SUMMARY OF ARGUMENT

Connecticut provides a comprehensive public assistance program; as a part of that program it provides medical assistance to the indigent, or 'medicaid'; as part of that medicaid program it provides medical assistance for all pregnancy-related care; and as part of that medicaid program it provides medical assistance for therapeutic abortions.

By conditioning the receipt of medicaid payments on the patient's decision to forego elective abortion, the state has created a disfavored class of persons, consisting of medicaid-eligible women who seek to exercise their fundamental constitutional right to abortion as enunciated in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973). The state imposes a burden upon that class and interferes

with the exercise of that right. The state cannot condition the receipt of government benefits so as to penalize those who exercise a fundamental right. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1954). As the court below found:

> When Connecticut refuses to fund elective abortions while funding therapeutic abortions and pre-natal and post-natal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion.

408 F. Supp. at 663, Memorandum of Decision, Juris. Statement at 20.

By requiring prior authorization from the Department of Social Services, the state further interferes with the abortion decision in contravention of *Doe v. Bolton, supra*. The attending physician is forced to delay, for approximately two weeks, a procedure which should be performed as early in pregnancy as possible. The risks to the women are thus increased, and some women must delay abortion until the more dangerous second trimester of pregnancy. Additionally, the prior authorization requirement means that a third person reviews the attending physician's medical judgment as to the need for the abortion.

No sufficient state interest has been asserted by the appellant to justify the infringement of the exercise by the appellees of their rights. The state claims that it conserves public funds by not paying for elective abortions. As this court has said in *Memorial Hospital v. Maricopa County, supra* at 263, "conservation of the taxpayer's purse" is not a compelling state interest where fundamental rights are concerned. Additionally,

abortion is the least expensive form of pregnancy related care, and the state does not dispute this.

Nor has the state advanced any sufficient interest to justify its requirement for prior approval of the abortion. The appellant has never indicated why such a requirement is necessary for abortion and not for all the other forms of comparable care, which are reimbursed upon application of the physician after services are rendered. The state claims that it never questions the judgment of the attending physician when it rules on requests for authorization, yet the regulation clearly does require the Department to review the judgment of the physician. Moreover, if there is in fact no such review, there can be no justification for the requirement in the first place.

The state has in reality made a moral or political judgment that it should not pay for elective abortion. Such a judgment is not a compelling interest; it does not even form a rational basis for the burdens imposed by this regulation.

The District Court held that Connecticut could not impose any requirement for medicaid payment for abortion which is not "equally applicable to medicaid payment for child birth." 408 F. Supp. at 665. Juris. Statement at 23. Plaintiffs ask that this holding be affirmed, because it is consistent with prior decisions of this court and with the protection of the fundamental rights of the plaintiff class.

ARGUMENT

I.

THE STATE CANNOT DENY PUBLIC ASSISTANCE TO THOSE WHO CHOOSE TO EXERCISE A CONSTITUTIONAL RIGHT

The right of a pregnant woman to determine whether to terminate her pregnancy, is grounded in the right to privacy and to personal liberty. *Roe v. Wade, supra* at 177. At least during the first trimester of pregnancy the women's right to make that determination, with her physician, is fundamental, and may not be infringed by the state absent a compelling state interest. *Id.* at 178, 182-3.

That the withholding of public benefits can constitute an unwarranted interference with Constitutional rights is now beyond debate. This court has said that benefits may not be denied to those exercising the right to travel, in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County, supra.* These cases are particularly in point because they concern a right which, like abortion, is founded in the concept of personal liberty rather than in any explicit Constitutional provision. In *Shapiro,* the state had imposed a one-year residence requirement for AFDC eligibility. *Shapiro* was extended to apply to medical care in *Memorial Hospital.* That case struck down an Arizona statute requiring one year's county residence as a condition of receiving non-emergency public medical care. Both cases stress that the challenged regulation need not necessarily prevent the exercise of a Constitutional right. The law prohibits as well a penalty imposed upon persons who assert the right in question.

394 U.S. at 629-630, 415 U.S. at 257. See also *Dunn v. Blumstein*, 405 U.S. 330, at 339-340:

> In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by any classification which serves to *penalize* the exercise of that right. (emphasis in original)

and *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35. (1973)

This case is not about the right to receive medical benefits, as appellants insist. (*Memorial Hospital* refers to medical care as a "basic necessity of life," 415 U.S. at 259, yet the court declined to base its decision on the right to such care.) The case at bar is rather about the state's ability to use a public benefit program to penalize the exercise of a fundamental right. The impermissibility of such manipulation has been manifested by this court at least since *Sherbert v. Verner*, 374 U.S. 398 (1963), held that South Carolina could not deny unemployment compensation to a Seventh Day Adventist who was unemployed because her religious beliefs prevented her from working on Saturday.

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. *Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.* (emphasis added)

374 U.S. at 404. It would, in fact, be inconceivable for a state to deny a government benefit to anyone because of the way in which one exercises First Amendment Rights, either as to religious preference or political or moral persuasion. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), *Speiser v. Randall*, 357 U.S. 513 (1958). All of the cases cited require a compelling state interest to justify such restrictions.

In none of the cited cases was the state being asked to pay for the exercise of the fundamental right involved. In the first amendment area, in fact, any such notion might well run afoul of the Establishment clause. Similarly, plaintiffs do not contend that the state must pay for abortions simply because it is a women's right to terminate her pregnancy. Nevertheless the state cannot deliberately condition the receipt of medical benefits upon the recipient's willingness to forego the exercise of that right.

II.

THE STATE DENIES EQUAL PROTECTION OF THE LAWS WHEN IT REFUSES MEDICAID PAYMENT FOR ELECTIVE ABORTION

By singling out pregnant women who choose abortion and restricting them from medicaid reimbursement, the state is in fact creating a disfavored class, in violation of the equal protection clause of the Fourteenth Amendment. *Smith v. King*, 392 U.S. 309, 312, fn. 4 (1967).

Plaintiffs are members of a disfavored class in respect to three separate considerations: (1) plaintiffs are

denied reimbursement for a legitimate medical expense necessitated by their pregnancy because they have made a morally disfavored choice, abortion, while women who, as the state would wish them to, choose to carry pregnancy to term are granted medical assistance for all pregnancy-related care. Defendants answers to interrogatories admit that no other form of obstetrical care requires prior authorization or proof of medical necessity: (2) They are denied the right to choose an abortion solely because of their indigency. Women who can afford the necessary medical care can obtain abortions subject only to restrictions permitted under *Roe v. Wade*, supra: (3) Plaintiffs are required to undergo the burdensome and time-consuming procedure of obtaining prior approval of a service authorized by their physicians. Such approval is not required for any other hospital procedure, nor for any comparable physician's care. See statement of facts, *supra*. Moreover, *no* other medical procedure requires any certification of medical necessity or certification as to the place of treatment and the operating privileges of the attending physician.

The regulation at bar creates a classification of indigent women who choose to undergo abortion rather than bear an unwanted child. An indigent woman faced with an unwanted pregnancy is forced by the State to choose the acceptable method of dealing with her condition: having the baby. A fundamental right is conditioned totally on the ability to pay, and so is negated altogether for plaintiff's class. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

> [A protected right] . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals. 401 U.S. at 379-380.

The administrative requirements for abortion reimbursement further single out all indigents who choose abortion rather than other forms of care and create obstacles which at best place unnecessary burdens on that choice and at worst deny persons making said choice the medical care they require. The Court below stated:

> The Constitution does not require the state to pay for any medical services at all. Nevertheless once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy. A serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion.

408 F. Supp. at 663, Memorandum of Decision, Juris. Statement 18 at 20. If Connecticut did not provide any public assistance for medical expenses connected with pregnancy, then the appellant's argument that there is no invidious discrimination would have greater credence. That was the case in *Geduldig v. Aiello*, 417 U.S. 484 (1974). *Geduldig* found no violation in California's disability insurance program which provided no coverage for pregnancy-related disabilities. *Geduldig* found that the state's substantial interest in excluding coverage for pregnancy justified the classification. The risk of pregnancy was outside the coverage of the statute. In the case at bar, the condition of pregnancy is within the scope of mandatory coverage. The exclusion falls only on those who make a disfavored choice in the treatment of pregnancies.

> Here, as in Shapiro and Maricopa County, we deal with governmental benefits for indigents. Here we deal with a particular subclass of indigents, those

who are pregnant. Here, as in Shapiro and Maricopa County, those indigent pregnant women who exercise a right protected by the constitution i.e., to have an abortion, are denied the governmental benefit solely as a consequence of the exercise of that right. Accordingly, in reliance on Roe, Shapiro and Maricopa County, we hold that although an indigent pregnant woman may not have a fundamental right to require the government to subsidize an abortion, where the state so classifies as to deprive particular indigents of the benefits otherwise available, as a consequence of their exercise of a fundamental right, the state legislation must be measured by the compelling state interest test and the state must demonstrate that its classification scheme promotes a legitimate governmental objective.

Planned Parenthood Assoc. v. Fitzpatrick, 401 F. Supp. 554, 581 (E.D. Pa. 1975) vacated and remanded *sub nom Beal v. Franklin*, 44 U.S.L.W. 3758. A majority of the lower federal courts have applied the foregoing analysis and concluded that the state may not deny payment for abortion, or otherwise place burdens or restrictions on the abortion decision which are not applied when a woman chooses to carry a pregnancy to term. *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974); *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974) aff'd *sub nom Singleton v. Wulff*, ____ U.S. ____ 49 L. Ed 2d 826 (1976); *Doe v. Westby*, 383 F. Supp. 1143 (D.S.D. 1974) rem. in light of *Hagans v. Lavine, sub nom Westby v. Doe*, 420 U.S. 968 (1975) dec. on rem., 402 F. Supp. 140 (W.D.S.D. 1975); *Doe v. O'Bannon*, No. 4-74 Civ. 69, (D. Minn. August 1, 1975); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1973) aff'd *sub. nom. Doe v. Beal*, 523 F. 2d 611 (3d Cir. 1975) cert. granted 49 L. Ed 2d 1216 No. 75-554 (1976),

Klein v. Nassau County Medical Center, 374 F. Supp. 496 (E.D. N.Y. 1972) rem. in light of *Wade* and *Bolton*, 412 U.S. 924 (1973); dec. on rem. 409 F. Supp. 731 (E.D. N.Y. 1976) *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973) *Doe v. Myatt*, No. 4-74- Civ. (D. Minn. August 1, 1975).

In a closely related line of cases, the courts have consistently struck down any refusal by a public hospital to perform abortion. *Orr v. Koefoot*, 377 F. Supp. 673 (D. Neb. 1974); *Nyberg v. City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974) app. dism., cert. den. 419 U.S. 891 (1974); *Doe v. Poelker*, 497 F. 2d 1063 (8th Cir. 1975) cert. granted 49 L. Ed 2d 1216 No. 75-442 (1976); *Doe v. Hale Hospital*, 500 F. 2d 144 (1st Cir. 1974) cert. den. 420 U.S. 907 (1975) and see *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973) (barring public hospital's ban on voluntary sterilization) *Doe v. Mundy*, 514 F. 2d 1179 (7th Cir. 1975), *Doe v. Ceci*, 517 F. 2d 1203 (7th Cir. 1975). These cases hold that a city which provides general medical care to the community may not refuse to provide the care necessary for abortion.

Any regulation of places where abortions are to be performed is invalid when it is different from that applied to other forms of medical care, cf. *Doe v. Bolton, supra.* This includes simple requirements that a facility be licensed, that the names and addresses of owners and personnel be disclosed and other administrative regulations. *Word v. Poelker*, 495 F. 2d 1349 (8th Cir. 1974); *Friendship Medical Center v. Chicago Board of Health*, 505 F. 2d 1141 (7th Cir. 1975) cert. den. 420 U.S. 997 (1975) *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn. 1974); *Hallmark Clinic v. North Carolina*, 380 F. Supp. 1153 (D.N.C. 1974).

> "Because we cannot say that this extra layer of restriction placed upon abortion is legitimately related to the recognized objectives of state regulations and further because the ordinance employs limitations that unduly penalize those patients who seek and those doctors who choose to perform abortions, we find it necessary to strike down ordinance No. 56579 in its entirety."

Word v. Poelker, 495 F. 2d at 1352.

III.

CONNECTICUT IMPOSES A SIGNIFICANT BURDEN ON WOMEN WHO CHOOSE ELECTIVE ABORTIONS, WHICH IS PERMISSIBLE ONLY TO FURTHER A COMPELLING STATE INTEREST

From the recent decisions of this court, a two-fold test emerges as to the constitutionality of post-*Wade* abortion regulations. In *Planned Parenthood of Central Missouri v. Danforth*, ____ U.S. ____ 49 L. Ed. 2d 788 (1976) the court considered Missouri's requirements as to patient, spousal and parental consent for abortion, medical procedures to be used in abortion and in caring for an aborted fetus, definitions of viability and certain record keeping and reporting requirements. As to each component of this statute the court examined its actual impact on the abortion decision. Thus the court found a ban on the use of saline abortions "an unreasonable or arbitrary regulation designed to inhibit and having the effect of inhibiting the vast majority of abortions after the first 12 weeks." Spousal and parental consent requirements were struck down because they allowed a person other than the woman or her physician to veto

the abortion. *Bellotti v. Baird*, ____ U.S. ____ 49 L. Ed 2d 844 (1976). The court reiterated its inquiry as to whether a given requirement "unduly burdens the right to seek an abortion," Id. at 856. The District Court below anticipated this concept when it held that

> "No state regulation of medicaid payments for abortion is permissible . . . If such conditions or requirements tend to discourage a woman from choosing an abortion or to delay the occurrence of an abortion that she has asked her physician to perform."

408 F. Supp. at 665, Memorandum of Decision, Juris. Statement at 23.

Once there is such a demonstrated burden on the abortion decision, the state must show a compelling interest to justify that burden, under *Roe v. Wade, supra, Doe v. Bolton, supra, Shapiro v. Thompson, supra* and *Sherbert v. Verner, supra.* The rational basis standard, and cases such as *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney* 406 U.S. 535 (1972) are inapplicable. Those cases deal only with the right to receive public assistance funds. Neither involved a "direct effect . . . upon the exercise of a constitutionally protected right." *Roe v. Norton, supra*, 408 F. Supp. 663, Memorandum of Decision, Juris. Statement at 20.

A. Defendants Cannot Require That an Abortion be Necessary to the Patient's Health

Under defendants' regulation, only "therapeutic abortion services within the state are covered under Title XIX." The abortion must be recommended as "medically necessary for the patient's health" by the

attending physician who must indicate in the request for prior authorization the reasons why the service is necessary.

Whatever the exact definition of "medically necessary for the patient's health," there can be no doubt that §275 is meant to exclude payment for some types of abortions. Otherwise there could be no conceivable reason for enacting the regulation. Moreover, these excluded abortions are protected by *Roe v. Wade* and *Doe v. Bolton, supra.*[4] Plaintiffs' physicians all stated, by affidavit, that they did not believe these abortions to be medically necessary to their patients' health.

> "I find no medical or other reason why this abortion should not be performed; however, there will be no danger to Ms. C's health should she carry her pregnancy to term.
>
> I cannot certify to the Department of Social Services that Ms. C's abortion is medically necessary to her health, without violating medical ethics."

---

[4] *Roe v. Wade, supra,* differentiates between abortions which may be detrimental to "mental or physical health" and those which, for other reasons, may cause distress or hardship for the mother and other members of her family. 410 U.S. at 153. And see Justice Berger's concurring opinion:

> The vicissitudes of life produce pregnancies which may be unwanted, or which may impair 'health' in the broad *Vuitch* sense of the term, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the 'health' factor of the mother as appraised by a person of insight *or they may be part of a broader medical judgment based on what is 'appropriate' in a given case, though perhaps not 'necessary' in a strict sense."*
>
> 410 U.S. at 216.

Affidavit of Eugene Corley, M.D. (A. 32, 33) See also Affidavits of Joseph Horowitz, M.D. (A. 36-37), James Kauders, M.D. (A. 22 and A. 28) and Affidavit of Gordon Jonas, M.D. (A. 64). Both Dr. Jonas and Dr. Corley also stated in their affidavits that the large majority of abortions which they performed were for family planning reasons. (A. 64, A. 62)

> The large majority of my patients request abortions for economic reasons; an unwanted child would cause great financial hardship for them or their families.
>
> Many of my patients are struggling to build a better life for themselves and their families and an unplanned pregnancy can ruin any chance they have of breaking the cycle of poverty.
>
> Women in this situation can, of course, carry a pregnancy to term and care for another child without any change in their psychological condition or their physical health.

Affidavit of Eugene Corley, M.D. (A. 62)

Perhaps not all physicians share these ethical scruples against certifying medical necessity where none exists. Section 275 does, however, require a statement of specific medical need, on Form W-601 (A. 45). Moreover as Dr. Jonas pointed out to the court:

> It is common knowledge that the overwhelming majority of abortions are performed as a family planning technique and not because of any danger to the physical or mental health of the mother;
>
> . . .
>
> I have consistently refused to perjure myself and claim medical necessity when none, in fact, exists;
>
> It seems to me to be highly undesirable for the welfare department to ask physicians to lie about their reasons in order to give their patients the care they need.

Affidavit of Gordon Jonas, (A. at 64) Nor should medicaid patients be forced to search for a physician who is willing to sign the proper papers, before they can obtain medical care.

Many medicaid-eligible women never even consulted physicians for abortions because they believed the state would not pay. In September of 1975, appellants sent a notice to all recipients stating that abortion would be reimbursed for a recipient:

> "Whose physician signs and submits to the Department a written statement indicating the medical need for the abortion which request the Department must approve . . ."

See Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, p.10. The result was that many women simply assumed they would be ineligible for abortion reimbursement. Affidavits of persons regularly dealing with medicaid recipients in need of obstetrical care confirm this. See Affidavits of Patricia Trunstall, (A. 68) Mary Hennessy, (A. 69) and Betty Carrion, (A. 71)

> "Since August 20, 1975 I have received many calls from women who believe that medicaid will not provide payment for abortion services.
>
> These women indicated to me that the State will not pay for abortions and often refer to a notice sent to them with their monthly Aid to Families With Dependent Children checks, stating that abortions must be medically necessary.

Affidavit of Mary Hennessy. (A. 69)

The appellant contends that it does not pay for non-medically necessary abortions because Connecticut provides medicaid payment only for services which are

medically necessary to the patient's health. Brief of Appellant, p. 11. It is impossible, logically or Constitutionally, to apply this policy to pregnancy. For a pregnant woman, some medical service is always necessary. If she choose abortion, further obstetrical care becomes "unnecessary for her health." Of course, neither the plaintiff nor the state claims that obstetrical care for full term pregnancy is unnecessary.

> Pregnancy is a condition which in today's society is universally treated as requiring medical care, pre-natal, obstetrical and post partum care, and undeniably it is provided under the medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition nor does the medical assistance in childbirth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance.

Klein v. Nassau County Medical Center, supra, 347 F. Supp. at 500.

This court in *Doe v. Bolton* addressed the validity of a Georgia requirement "based upon his [the physician's] best clinical judgment that an abortion is necessary." 410 U.S. at 191. The court upheld this requirement, making it clear that

> the medical judgment must be exercised in the light of all factors – physical, emotional, psychological, familial and the woman's age – relevant to the well-being of the patient.

410 U.S. at 192. The District Court in *Doe* had stricken from the statute the requirement that the abortion be necessary to avoid danger to life or permanent injury to health. Thus the valid necessity requirement in *Doe*

does not restrict the physician to a finding of necessity for health. It accepts the fact that there may be abortions which are unnecessary in the sense that the woman is not pregnant, or which are contraindicated because of a particular patient's physical condition. In all other situations, there really is no 'unnecessary' abortion, presuming the patient wishes to terminate her pregnancy.

The decision in *Doe v. Bolton* must, moreover, be read in the context of the court's insistance that the abortion decision be made by the patient in accordance with her own physician's best clinical judgment. Thus *Doe* struck down the requirement that abortion be approved by a hospital review committee. 410 U.S. at 197-198. That requirement served no reasonable state interest and there was no "other surgical procedure made subject to committee approval as a matter of state criminal law." *Id.* at 197.

Similarly, Connecticut manages to protect its asserted interest in providing medically necessary care in virtually all other comparable situations, without any special certification of necessity. There has never been any claim by the State of Connecticut as to why abortion requires greater vigilance than any other pregnancy related care in order to insure that the service is necessary. On the contrary, the state attempts to show that it does not, in fact, question the judgment of the attending physician. The state is claiming a compelling interest in determining medical necessity, by means of a procedure which admittedly does nothing to aid in the determination of necessity.

The state also asserts a concern that if it must constitutionally pay for abortion it will also be forced to pay for elective procedures such as cosmetic surgery.

As the District Court noted, this contention is without merit because "in declining to pay for these procedures, the state is discouraging the exercise of any constitutional right." 408 F. Supp. at 665. Memorandum of Decision, Juris. Statement at 22. The state does not presume to pay for the conditions leading to such elective surgery. The state can, if it chooses, refuse to pay for treatment of any particular *condition*, because there is no constitutional right to any state-funded medical care. It simply cannot discriminate between treatments relative to a particular condition in a way which interferes with the woman's right in consultation with her physician to make a constitutionally protected decision.

The state asserts a fiscal interest in excluding elective abortion from medicaid, in that the exclusion serves to conserve limited fiscal resources.

> First, a state may not protect the public fisc by drawing an invidious distinction between classes of its citizen.

Memorial Hospital v. Maricopa County, supra at 263, citing *Shapiro v. Thompson, supra* at 633. The District Court rejected this interest not only as not compelling, but as 'wholly chimerical' 408 F. Supp. at 664 Memorandum of Decision, Juris. Statement at 21. The Court found as a fact that abortion is the least expensive response to pregnancy. Absent abortion, the state bears the far more expensive cost of prenatal and post-natal care for the mother, full hospital obstetrical services for delivery, and hospital charges for the newborn. Of course, in most cases the state then provides for the child under its AFDC program. This finding is based on the record and not disputed, in spite of appellant's statements in his brief at Page 24. The

Court had before it the entire Medical Assistance Program Manual, and the Relative Value Scale of Physicians Services and Procedures and Diagnostic Codes. It was also undisputed that medicaid eligibility is dependent on the eligibility of the family for AFDC. The Court was therefore well aware of what funds the State would be obligated to provide if the plaintiffs did not obtain abortions, and the cost of these other expenses relating to childbirth is several times the cost of abortion. Even under the more stringent equal protection test used by the courts when only state fiscal policies are at stake, *Dandridge v. Williams, supra; Jefferson v. Hackney, supra* or the intermediate test based on *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) and *Reed v. Reed*, 404 U.S. 71 (1971), the state herein has not justified the discriminatory impact of Section 275.

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." *Reed v. Reed*, 404 U.S. at 76.

Appellants object to the District Court's holding that the state cannot limit funds for abortion which it finds 'morally objectionable.' The record before the court contained examples of statements by the Governor of Connecticut indicating that social and moral judgments were indeed behind the enactment of this regulation. In July, 1976, when the defendant herein was questioned as to whether §275 cost the state extra money, he replied, "The State has not studied short and long run costs. The cost is less important that the major moral issue of whether the state should provide abortions to those who want them." *New Haven Journal Courier*, July 7, 1976, P. 1. A similar attitude is expressed in the

Amicus Curiae brief of the State of New Jersey.[5] That brief basically argues that a state has an interest in creating a welfare program "socially and politically" acceptable to the people of the state, and that this interest satisfies at least the rational basis test. No party to this litigation denies the politically sensitive, indeed explosive, nature of the abortion issue. However, if New Jersey's views were to prevail, the result would be the subjugation of the Constitution to the perceived prejudices of the electorate. The views of one religion or other group would be 'established' in violation of the first amendment, and the way would be open for legislation penalizing particular minority religious or political ideas. Such a result would subvert the very basis of Constitutional government. As we are reminded by Professor Franz:

> Let us note that any constitutional limitation serves as significant function only insofar as it stands in the way of something which the government thinks ought to be done. Nothing else needs to be prohibited.
>
> Franz, The First Amendment In the Balance, 71 Yale, L.J. 1424, 1444 (1962).

B. Defendants Cannot Require Prior Authorization for the Performance of an Abortion

As noted in the Statement of Facts, supra, defendants have placed abortion in a special category of medical services which require prior approval or

[5] Permission for filing this brief was never requested by New Jersey, as is required under Rule 42 of the Supreme Court Rules. Appellees therefore object to its consideration by the court.

authorization before a provider of services can obtain reimbursement. As also noted, medical personnel in the Division of Health Services review the reason for the abortion and either approve or disapprove it. Like the review requirements at issue in *Doe v. Bolton,*

> The woman's right to receive medical care in accordance with the licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed review.

410 U.S. at 198.

This authority of the attending physician to make the abortion decision free from external interference was reaffirmed in *Planned Parenthood of Central Missouri v. Danforth, supra.*

> The State cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester.
>
> "... the state does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."

49 L. Ed. 2d at 805 and 808.

The state claims, through the Affidavit of Harold McIntosh (A. 17-19) that the Department "accepts at face value" the certification of medical necessity. If this were so, it totally negates the existence of any state interest in the prior authorization requirement. If there is no reason to review the request for authorization in advance, then the statement can simply be sent in with a request for payment as is required for all other pregnancy-related care, and indeed for the vast majority of services.

When this litigation was pending, the appellant's literally dictated the proper language to use for approval of abortions. See Affidavit of Harriet Bograd. (A. 66-67) The state never questioned this language, and it gave telephone approval in some situations. It simply defies credibility for the state to assert that such a procedure serves its interest in assuring that only necessary services are reimbursed. This meaningless exercise can as well be engaged in after as before the service is performed.

The prior authorization requirement of necessity imposes a delay of at least one week and most often two weeks in the abortion process and is, thus, detrimental to maternal health rather than related to it. See Affidavit of Sandra Sereque (A. 39-40) in which she states that there is a time lapse of approximately two weeks between the time form W-601 is submitted and the day it is returned. All the physicians' affidavits indicated that time is crucial to a safe abortion and that one should be scheduled within days of the decision to terminate the pregnancy. Affidavits of James Kauders, M.D., (A. 29), Eugene Corley, M.D.,(A. 32-33 and A. at 61-62), Joseph Horowitz, M.D. (A. at 38 and A. at 57-59) and Gordon Jonas, M.D. (A. at 65). Both Dr. Corley and Dr. Jonas indicated that Medicaid recipients tended to wait until later in their pregnancies to consult a physician than other women. For Carol C. the two-week delay would have brought her within the 10th and more dangerous week of her pregnancy. Affidavit of Eugene Corley, M.D. (A. 32)

The District Court found that prior approval caused a delay in performing the abortion, despite the appellant's assertions to the contrary. The state also argued below that if delay were a problem, the physician could

simply telephone the proper authorities and obtain verbal prior authorization. Affidavit of Harold McIntosh, *supra.* Certainly the regulation gives no hint of the availability of this procedure. Mr. McIntosh also states that many other services require prior approval. He has never disputed the fact that no other obstetrical or short term hospital care, or in fact any other similar service, requires prior authorization.

The District Court was correct in looking to the face of the regulation in making its decision, rather than accepting the state's claim that it has no impact. The District Court for the Eastern District of New York has recently given short shrift to similar claims made before it.

> There is an indication that if physicians certify that the abortion is 'medically indicated', the certificates are not in practice questioned, but there can be no assurance that the covert practice will continue, when the State's official position continues to be what it is (cf *Bulluck v. Washington,* 1972, 152 VS App. D.C. 39, 468 F. 2d 1096), and moreover, such a dubious certification practice is, in any event, not a legally tolerable substitute for a final clarification of the validity of the Administrative Letter.

Klein v. Nassau County Medical Center, supra, 409 F. Supp. at 733.

C. Defendants Cannot Require Prior Submission of the Patient's Consent as a Condition for Reimbursement for Abortion

Appellees do not agree that *Danforth* validates the patient consent requirement in this case. *Danforth* holds constitutional a requirement that a patient consent in

advance, in writing, to an abortion. Connecticut goes further, and requires proof of prior written consent before it issues its prior authorization for an abortion. The state under *Danforth* may require proof that the consent was in fact given prior to the surgery. The problem with §275 is the requirement that the state actually review the validity of the consent beforehand. Like the entire prior authorization requirement there is a danger of delay, without any showing that a state interest is served by this demonstration of consent before, rather than after the procedure is performed.

Taken as a whole, Section 275 creates an "extra layer of restriction placed on abortion" *Word v. Poelker, supra* at 1332, which must fall, because it serves no compelling state interest and "unduly penalizes those patients who seek and those doctors who choose to perform abortions." *Id.* Neither health of the mother nor concern for the fetus, are served by denying medical assistance for abortion, or by surrounding the availability of medicaid funds with administrative requirements which deter or at best delay the necessary medical treatment.

Defendants have undertaken to provide medical care to all eligible medicaid recipients. They have then singled out that group of recipients requiring abortion and refused and restricted that particular form of care. Plaintiffs submit that fundamental constitutional guarantees require this Court to strike down the challenged policy and to require the payment of reasonable costs for abortion services. There is no ground of differences nor relationship to state interest that rationally explains the different treatment accorded poor women with respect to the availability of abortion services, as contrasted with pre-and postnatal services or

with other medical services reimbursable under the state's Medical Assistance Program.

CONCLUSION

For all of the foregoing reasons, Appellees respectfully request this court to affirm the decision of the United States District Court for the District of Connecticut enjoining the State of Connecticut from refusing medicaid payments for abortion which a woman, with her physician's concurrence, decides to undergo, and from imposing any requirement or condition upon abortion payments which is not imposed on payments for other pregnancy-related care.

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

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Appellant,

vs.

SUSAN ROE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Connecticut

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS	1
ARGUMENT—The State's interest in fashioning a reasonable, response and publicly acceptable public welfare assistance program for medical services constitutes a rational basis for providing assistance only for those medical services, including abortions, which are medically indicated	4
CONCLUSION	9

Cases Cited

Dandridge v. Williams, 397 US. 471 (1970)	6, 9
Doe v. Klein, Docket No. 76-74	3
Doe v. Wohlgemuth, 376 F. Supp. 172 (D. N.J. 1975), rev'd sub nom., Doe v. Beal, 523 F. 2d 611 (3rd Cir. 1975), cert. granted, 44 L.W. 3761 (1976)	5, 8
Gedulig v. Aiello, 417 U.S. 484 (1974)	7, 9
Jefferson v. Hackney, 406 U.S. 535 (1972)	5-7, 9
Lindsey v. Normet, 405 U.S. 56 (1972)	9
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	6

United States Constitution Cited

Fourteenth Amendment	2, 4

Statutes Cited

L. 1975, Ch. 261	3
N.J.S.A. 30:4D-6.1	3

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Interest of the *Amicus*

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because of its extreme importance to the State, in terms of the ability of its Legisla-

ture to fashion, within reasonable fiscal limits, such public welfare assistance programs for medical services as it deems most responsive to the competing public needs. The decision of the United States District Court for the District of Connecticut, as well as other similar decisions, which have read far-reaching requirements with respect to allocation of public welfare assistance programs into the Equal Protection Clause of the Fourteenth Amendment, promises to substantially undermine the necessary flexibility a state must have to fashion such assistance programs attuned to the immediate local climate.

The nature of the welfare assistance program in New Jersey in general and for medical services in particular, is extensive and varied. Because, however, the fiscal resources of the State are limited, it does not provide for every service which might be desired. Rather it reflects difficult choices made by the duly elected representatives of the people in terms of evaluating and balancing the complex and competing needs of the poor. The choices made by the State's Legislature concerning reimbursement for medical services are not only difficult because they must, of necessity, be selective, but they become even more difficult because of the delicate and controversial nature of the public welfare assistance program in general and the Medicaid program in particular. While the state must provide for the competing needs of its poor, it must do so with the confidence and acceptance of all of its people since the very well being of any democratic government depends totally upon the acceptance by and support of the people for whom it serves. This support and acceptance becomes particularly crucial when the state endeavors to provide for such controversial services as reimbursement for abortions. It is precisely this dilemma

faced by any state's elected officials, in attempting to fashion responsive and remedial welfare assistance programs, that has moved this Court so many times to reaffirm and uphold the broad flexibility of the states to allocate their resources for social programs.

In an attempt to provide a sound and publicly accepted welfare assistance program for medical services. the state, for the large part, has attempted to satisfy the most urgent and necessary needs of the poor. Thus, in terms of medical assistance, the State has, for the present, chosen to provide for those services which are medically necessary. In an attempt to extend such assistance for abortions, which so often has generated emotional reactions amongst the public, the State has followed this present policy and authorized, by Laws of 1975, Chapter 261 (N.J.S.A. 30:4D-6.1), assistance for the termination of a woman's pregnancy where "it is medically indicated to be necessary to preserve the woman's life." Even this limited approval of public assistance, however, has met substantial and widespread social and political resistance.

Indeed, a suit is presently pending in the Federal District Court for the District of New Jersey challenging the validity of that law on the same constitutional and statutory ground raised below in this case. *Doe* v. *Klein,* Docket No. 76-74, United States District Court, District for New Jersey. As a result of the recent decisions concerning this issue, New Jersey's law has been preliminarily enjoined by the Federal District Court in *Doe* v. *Klein.* Any decision by this Court in the present case will substantially, if not conclusively, impact on the outcome of *Doe* v. *Klein* and the validity of Laws of 1975, Chapter 261.

Thus, an affirmance of the district court's judgment would result in the imposition upon New Jersey by judicial decree of a highly controversial welfare assistance program for medical services which the State Legislature has determined, after considering the competing local concerns and needs, is not at the present time an appropriate allocation of available revenue resources. It is clear, therefore, that the State of New Jersey has a vital interest in preserving the authority of its Legislature to fashion provisions for such controversial public welfare assistance which are consistent with its views of proper allocation of State resources amongst the competing interests of the poor.

ARGUMENT

The State's interest in fashoning a reasonable, responsive and publicly acceptable public welfare assistance program for medical services constitutes a rational basis for providing assistance only for those medical services, including abortions, which are medically indicated.

The ultimate constitutional issue involved in this case is whether the equal protection of the law under the Fourteenth Amendment inflexibly mandates a state government to allocate available public resources for abortions which are not medically necessary, when that government has elected to allocate its resources to provide coverage for medically necessary expenses of birth including medically necessary abortions. Although this issue has been characterized by other courts as concerning a woman's "fundamental" right to have an abortion during the first two trimesters of pregnancy, thus requiring the application of

the state compelling interest test in determining the validity of the classification involved, the application of this standard is based upon a misconception of the nature of the state statutes and policies involved. What is involved in this case is not a violation of a woman's right to choose to have an abortion, but simply a policy determination by the duly elected representatives of a state concerning the appropriate allocation of public funds for medical assistance to the poor.* This Court has not held that a state is under a duty to finance the exercise of a pregnant woman's choice to have an elective abortion, neither has it ever held that medical care in general is a fundamental right; and it has declined to characterize welfare as a fundamental right. *E.g., Jefferson* v. *Hackney,* 406 U.S. 535 (1972).

In this respect, a party who challenges the validity of social legislation under the Equal Protection Clause of the Fourteenth Amendment generally bears the heavy burden of demonstrating that the Legislature has acted in

---

* The assumption that the state policies involved herein violate a woman's constitutional right to choose to have an abortion is based in part upon the factually unsupported contention that without public reimbursement indigent women will be unable to obtain an abortion. As noted by Judge Weis in his dissenting opinion in *Doe* v. *Wohlgemuth,* 376 F.Supp. 172, 193 (D. N.J. 1975), rev'd *sub nom, Doe* v. *Beal,* 523 F.2d 611 (3rd Cir. 1975), *cert.* granted, 44 L.W. 3761 (1976), "it is only money from the state which is at issue and the absence of state funds, on this record, will not absolutely prevent the plaintiffs from obtaining the services which they desire." The cost of an abortion in the first trimester which need not be performed in a hospital is not substantial and, as Judge Weis noted, "it may be assumed that various nonprofit organizations' interest in advancing their point of view of the desirability of abortions on demand realistically could be expected to give financial assistance if approached." *Id.* n. 5.

an invidiously discriminatory or palpably unreasonable manner. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). It has consistently been held that while the Equal Protection Clause prohibits invidious discrimination, state statutory classifications will be set aside only if no grounds can be conceived to justify them. Particularly with respect to welfare programs, so long as the classification created is rationally supportable, this Court will not interpose its judgment for that of the state Legislatures. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Mr. Justice Rhenquist aptly observed for the Court in *Jefferson* v. *Hackney, supra,* 406 U.S. at 551:

> "'We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.'"

Thus, in *Dandridge, supra,* the Court rejected a claim that a Maryland welfare regulation, establishing a maximum grant for any AFDC family, denied equal protection to children in large families. Although the maximum grant limitation obviously discriminated against such children, the Court found that fiscal consideration as well as the maintenance of income differentials between welfare recipients and the working poor provided a ratonal justification for the discrimination. In *Jefferson* v. *Hackney, supra,* the Court sustained the validity of a welfare program under which the aged and disabled received higher benefits than dependent children, even though there was a substantially larger percentage of blacks and Mexicans in the dependent children program and despite the weakness of the proof that children have lesser needs than the aging and disabled.

Perhaps most pertinent to this case is the Court's recent decision in *Gedulig* v. *Aiello,* 417 U.S. 484 (1974). Reaffirming the wide discretion accorded states in the fashioning of appropriate welfare programs, this Court rejected a challenge on equal protection grounds to the provisions of the California employment disability legislation which excluded coverage for pregnancy related disability. Recognizing the legitimate concerns of the states in attempting to provide sound programs with limited resources for as many people as possible, the Court upheld the exclusion despite the fact that the California program provided coverage for the full range of other medical disabilities.

The distinction made in the present case between medically necessary expenses of pregnancies, including therapeutic abortions, and nonmedically necessary expenses of pregnancies, including elective abortions, is no less a valid exercise of the states' powers to fashion appropriate welfare programs. It represents a considered evaluation of various conflicting and competing interests and needs within the broad scheme of the entire structure of welfare programs and the limited resources for such programs. It does no more than strike a reasonable balance between totally excluding assistance for all medical services attendant with pregnancies and providing for all

medical services attendant with pregnancies, including elective abortions, a program which would clearly be fiscally, socially and politically unacceptable. The choice made to allocate public resources for only those medical services which are medically required, including therapeutic abortions only, surely has some basis in reason and therefore is a proper exercise of legislative power. As Judge Weis said in his dissent in *Doe* v. *Wohlgemuth,* 376 F.Supp. 173, 194 (W.D. Pa. 1974), rev'd *sub nom., Doe* v. *Beal,* 523 F.2d 611 (3rd Cir. 1975), *cert.* granted 44 L.W. 3761 (1976):

> ". . . While a financial basis for such a broad policy is obvious, another consideration may be the additional strain on limited medical facilities and resources. Nor can we ignore the difficult legislative judgment as to where to draw the line so that the medical services furnished without charge to the indigent are not so grossly disproportionate to those which may be available to those who, while not indigent, have little money to pay for necessary care, let alone electives, after paying for the absolute necessities of life."

As set forth in the interest of the *amicus* portion of this brief, the Legislature of the State of New Jersey, duly elected by the people of this State, has determined to allocate available public funds amongst the competing interests of the poor to provide assistance for necessary medical services, including therapeutic abortions, prenatal and other medically necessary childbirth care. Such determination involves areas of controversy primarily entrusted to State government. It is certainly not the function of courts to choose between competing claims for public revenues or conflicting social and political theories. Even assuming that the present system of allocating public funds for certain welfare medical assistance programs in many states might not be the most palatable it should be remembered that ". . . the Constitution does not provide judicial remedies for every social and economic ill." *Lindsey* v. *Normet,* 405 U.S. 56 (1972).

CONCLUSION

The District Court failed to give consideration to the equal protection principles governing this case set forth expressly in *Gedulig* v. *Aiello,* 417 U.S. 484 (1974); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972); and *Dandridge* v. *Williams,* 397 U.S. 471 (1970). It is respectfully submitted that the application of those priniciples to this case clearly demonstrates that the decision below is erroneous and should be reversed.

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IN THE

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INDEX

PAGE

Motion for Leave to File Brief Amici Curiae 1

Brief Amici Curiae 7

Interest of the Amici 8

Summary of Argument 8

ARGUMENT:

I. The judgments below must be affirmed because state policies denying Medicaid payments and public hospital services to pregnant women who choose abortion, while providing such payments and services to women who choose to carry pregnancy to term, deprive women and their physicians of the constitutionally protected right of privacy, create an invidious classification invalid under the Fourteenth Amendment, and serve no legitimate state purpose 9

II. The discriminatory policies denying public services to indigent women who choose abortion serve no secular purpose but rather only promote and establish a particular religious view in violation of the First and Fourteenth Amendments 29

CONCLUSION 33

Table of Authorities

PAGE

Cases:

Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill. 1975), aff'd 96 S. Ct. 388 (1975) 19

Boddie v. Connecticut, 401 U.S. 371 (1970) 12

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 30, 31
Connecticut v. Menillo, 423 U.S. 9 (1975) 18

Dandridge v. Williams, 397 U.S. 471 (1970) 11
Doe v. Bolton, 410 U.S. 179 (1973) 12, 20, 23
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PAGE

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PAGE

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The undersigned, as counsel for the American Public Health Association, Planned Parenthood Federation of America, Inc., the National Organization for Women and sixty-six medical school deans, professors and individual physicians respectfully move this Court for leave to file the accompanying brief *amici curiae*.

The American Public Health Association is a national non-governmental organization established in 1872. Its object is to protect and promote personal and environmental health. With a membership of over 50,000, it is the largest public health organization in the world. Within this membership, both professional health workers and consumers act in a leadership role to develop a national policy to provide equitable, quality health care for all citizens.

Planned Parenthood Federation of America, Inc., also known as Planned Parenthood-World Population (Planned Parenthood), is a non-profit corporation organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 188 affiliates in 45 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 725 family planning clinics offering services to the public. Most affiliates offer medical services, including 19 which offer abortion services as part of their program. Twelve affiliates are educational units without medical services. Most Planned Parenthood affiliates which do not perform abortions themselves offer abortion counseling and referral.

Planned Parenthood's concern with family planning and health necessarily includes concern with the availability of abortion, and with the compelling problems resulting from restrictive abortion laws which have in the past made medically safe, legal abortions unavailable to many women. On October 19, 1974, the membership of Planned Parenthood adopted the following Policy Statement:

> Planned Parenthood believes that the optimum method of birth planning is the consistent employment of effective contraception. However, in the event of unwanted pregnancy, abortion as a back up procedure must be available and accessible to all women.
>
> The Constitutional right of privacy includes a woman's right to seek an abortion. Planned Parenthood believes that a woman, in consultation with a physician, has the right to obtain an abortion under safe, legal, dignified conditions, and at a reasonable cost. A woman should be fully informed and counselled concerning the nature, the consequences, and the risks of the procedure. Under every circumstance, a woman should have full knowledge of the alternatives available to her when making a decision to continue or terminate a pregnancy.
>
> Abortion must always be a matter of personal choice. Planned Parenthood recognizes its responsibility to guard equally against coercion or denial in connection with a patient's decision about continuing a pregnancy. The Federation will exercise special vigilance in protecting the freedom of choice and the civil rights of those who are dependent upon either public or voluntary agencies and in protecting a woman's personal choice.

> No one should be denied abortion services because of age, inability to pay, or other economic or social circumstances. Public and private funds should be made available to subsidize the cost of abortion services for those who want, and need, but cannot afford them.

The National Organization for Women (NOW) is a non-profit civil rights organization of over 30,000 members and 700 chapters throughout the United States. Organized in 1966, NOW exists to secure full and equal social, political, and economic rights for women.

All of these organizations believe the outcome of these cases deeply affects the rights of poor women to control their own bodies and destinies. Convinced these rights are essential to personal moral integrity and the achievement of full economic and social equality, these organizations seek to present the reasons they believe the judgment below must be affirmed.

The more than 65 individual physicians who as *amici* subscribe to this brief all practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are training in the speciality of obstetrics and gynecology. These physician believe that the policies challenged in these cases constitute an unwarranted governmental interference with the right of physicians to administer health care in accordance with their best professional judgment.

The annexed brief argues that Connecticut, by denying Medicaid payments for abortions, has placed a heavy burden on the woman's constitutional right to choose whether or not to have an abortion while advancing no legitimate state interest. Similarly, St. Louis, by denying access to

public hospitals to poor women who choose abortion, establishes an invidious distinction between those pregnant women who choose delivery and those who choose abortion, and advances no legitimate purpose. These classifications violate the constitutional guarantee of equal protection.

We have sought the consent of the parties to file a brief *amici curiae*. Counsel for Appellee, Appellant and Respondents have consented. Counsel for Petitioners have not replied to our request.

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No. 75-442

JOHN H. POELKER, *etc., et al.*,

Defendants-Petitioners,

—against—

JANE DOE, *etc.*,

Plaintiff-Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, AND ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE NATIONAL ORGANIZATION FOR WOMEN AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Summary of Argument

When Connecticut denies Medicaid payments for services provided to those indigent pregnant women who choose to have an abortion, while paying for services provided to those women who choose to carry their pregnancy to term, the state creates an invidious classification which effectively denies poor pregnant women their Constitutional right to privacy. Medicaid benefits for treatment of pregnancy are conditioned upon the forfeiture of the woman's right to choose, with her physician, whether or not to have an abortion. Similarly when St. Louis closes the doors of its public hospitals to women seeking medical services for abortion, while providing public hospital services to those women who choose to carry pregnancy to term, the City creates an invidious classification which discriminates against those women who would choose to have an abortion.

No compelling state interest justifies these infringements on the rights of poor women. Indeed, policies restricting access to abortion sacrifice every legitimate state interest in this area. These policies substantially increase risks to maternal health and directly increase demands on public

funds. The only interest actually furthered by these policies is an impermissible one of forcing poor women to act in accordance with the religious views of a segment of the population.

ARGUMENT

I.

The judgments below must be affirmed because state policies denying Medicaid payments and public hospital services to pregnant women who choose abortion, while providing such payments and services to women who choose to carry pregnancy to term, deprive women and their physicians of the constitutionally protected right of privacy, create an invidious classification invalid under the Fourteenth Amendment, and serve no legitimate state purpose.

A. *State Action Creating a Distinction Between Those Poor Pregnant Women Who Choose Abortion and Those Who Choose Childbirth Must—at a Minimum, Be Supported by Some Legitimate State Interest.*

The issue presented in these cases is whether the state, having chosen to provide poor women with public services for the treatment of pregnancy, may create a distinction between those women who choose to have an abortion and those who choose to carry pregnancy to term. General equal protection principles require that whenever the state creates a classification denying or limiting benefits to one group of people while granting benefits to another group alleged to be similarly situated, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly

circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). If the denial or limitation of benefits discourages the exercise of a constitutionally protected liberty, the classification must be supported by a compelling state interest.[1] The "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). *See also Planned Parenthood of Central Missouri* v. *Danforth,* 96 S. Ct. 2831, 2837 (1976). In light of the constitutional protection afforded the right to choose whether or not to have an abortion, and in light of the direct and substantial impact which the policies challenged here have in denying that right of choice to poor women, the more stringent constitutional standard is clearly more appropriate. However, the policies challenged here cannot pass muster under any constitutional standard since they do not further any legitimate state purpose.

It is important to note at the outset the factors which make this case fundamentally different from similar constitutional claims presented to this Court, and to delineate the issues which are not presented. This case is unique for two reasons. First, it is unique because pregnancy is unique. Although pregnancy is a condition which, in this

[1] *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969) held that welfare recipients who moved from one state to another were exercising a constitutional right to travel and "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Stated another way, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert* v. *Verner,* 374 U.S. 398, 405 (1963). *See also Memorial Hospital* v. *Maricopa,* 415 U.S. 250, 261-62 (1974).

society, requires medical treatment, it is not a disease, illness or injury. Pregnancy is, in most cases, a normal condition which requires medical treatment. It is the only common normal condition for which medical treatment is rountinely needed. For this reason, analogies drawn about other sorts of medical treatment are of limited utility. The concept of medical necessity in relationship to the treatment of pregnancy is discussed in more detail in section I-B-ii, *infra.*

The issues presented here are unique for a second reason, which has direct bearing on the constitutional standard to be used in judging the validity of the classification created by the State of Connecticut and the City of St. Louis. Over the past decade this Court has had many occasions to consider whether constitutional guarantees of equal protection are infringed when the state, in the interest of preserving limited public funds, denies or limits benefits to one class of poor people, while granting benefits to another class alleged to be similarly situated.[2] But never before has there been a case in which poor people have asked that they be afforded a less costly benefit, and the state has insisted that they may only have a more costly one.

There are two issue which these cases do not present. First, these are not cases in which the plaintiffs argue that the right to abortion is so fundamental that the state has an affirmative obligation to enable the poor to obtain services which people with money may purchase for themselves. This Court has held that some rights are so funda-

[2] *See, e.g., Shapiro* v. *Thompson, supra; Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Memorial Hospital* v. *Maricopa, supra.*

mental that the state must provide the poor with the means to exercise them.[3] Arguably the right of privacy in relationship to abortion is a right of such fundamental importance.[4] Some lower courts have so held.[5] But this

[3] *Boddie* v. *Connecticut*, 401 U.S. 371 (1970). *See also Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

[4] *Boddie* v. *Connecticut*, *supra*, at 374, rests in part on the fundamental importance of "the marriage relationship in this society's hierarchy of values." Whether a woman has a child or not has an impact on the individual life of magnitude which is, if anything, greater than whether an individual remains married. For example, in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), this Court recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The other critical factor in *Boddie* was that the state monopolized the means by which individuals could begin or end a marriage. While the state does not directly monopolize the provision of abortion services, it does require that these services be provided by licensed medical personnel, and state determinations about the availability of Medicaid and public hospital services effectively determine whether or not poor women will be able to obtain abortion services.

[5] *Klein* v. *Nassau County Med. Ctr.*, 347 F. Supp. 496 (E.D.N.Y. 1972), *vac.* and *rem.* in light of *Doe* v. *Bolton* and *Roe* v. *Wade*, 412 U.S. 925 (1973). Remand decision 409 F. Supp. 731 (E.D.N.Y. 1976), appeal docketed May, 1976.

The three judge district court in *Klein* held: "The directive [which denies Medicaid reimbursement for abortions that are not 'medically indicated'] and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term childbirth, have complete freedom to make the choice . . . uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child . . . She is thus discriminated against by reason of her poverty and by reason of her behavioral choice." *Id.* at 500. *See also Doe* v. *Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Westby*, 383 F. Supp. 1143 (D. S. Dak. 1974), *vac.* and *rem.* 420 U.S. 968 (1975); remand decision 402 F. Supp. 140 (D. S. Dak. 1975); *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975).

more difficult issue is not presented by these cases. Rather the issue here is whether the state, having chosen to provide medical services for pregnancy, may deny those services to those women who choose abortion rather than delivery.

There is a second difficult question which is not presented by these cases. That is the issue whether the state is constitutionally free to exclude all services for treatment of pregnancy from its medical services programs for the indigent. This Court has held that because of the unique characteristics of pregnancy, the state may exclude benefits for pregnancy from some programs providing benefits to the disabled or ill.[6] But Connecticut has not excluded all services for the treatment of pregnancy from its Medicaid program. St. Louis has not closed the obstetrical and gynocological services of its public hospitals. Public hospitals which offer obstetrical services for delivery have the facilities and trained personnel to provide abortions. Both Connecticut and St. Louis provide services for the treatment of pregnancy, whether normal or complicated. The only limitation is one which conditions the right to services upon the forfeiture of the right of a poor woman to choose, with her physician, to have an abortion. The only issue presented is whether the state may use its public medical programs to coerce poor women, who seek abortion as treatment for pregnancy, to wait until delivery is inevitably required.

[6] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

B. *Every Legitimate State Purpose Is Undermined by the Classification Denying Publicly Financed Medical Services to Poor Pregnant Women Who Choose Abortion While Providing Such Services to Women Who Choose Childbirth.*

The State of Connecticut and the City of St. Louis advance diverse and shifting reasons in support of their policies restricting abortion services for poor women. For two years Connecticut defended its policy denying Medicaid payments for "non-therapeutic" abortions exclusively on the grounds that the Social Security Act prohibited such payments. During this time the Secretary of HEW continued to assure the state authorities that federal reimbursement was and is available under Medicaid for all abortions.[7] When the Second Circuit Court of Appeals held that the Social Security Act allows the states to provide payment for abortions without restriction,[8] Connecticut instead of changing its policy asserted new reasons to support it. The reasons now proffered are: 1) "the necessity to limit state funds in the welfare field," and 2) the "service which is being sought to be included for payment . . . is not medically necessary."[9]

St. Louis seems to advance several reasons in support of its policy denying public hospital services to women who seek abortions. First is the protection of the life and health of the mother,[10] and second is the "continuation of the Human Race."[11] For the first time on this appeal, the

[7] *Roe* v. *Norton*, 522 F.2d 928, 931 (2d Cir. 1975).

[8] *Id.* at 932.

[9] *Maher* v. *Roe*, U.S. No. 75-1440, *Brief of Appellant*, p. 23.

[10] *Poelker* v. *Doe*, U.S. No. 75-442, *Brief for the Petitioners*, p. 39.

[11] *Id.* at pp. 39-40, 49-50.

City argues that contrary to the finding of the courts below they do not have a policy prohibiting the performance of non-therapeutic abortions, and advance considerations of administrative convenience as a ground for resisting compliance with the order entered below.[12] None of the reasons asserted in support of the policies denying poor women abortion services can withstand even the most deferential scrutiny.

i. Since the Policies Restricting Abortions for Poor Women While Providing Pregnancy Services Without Restriction for Women Who Reject Abortion Result in Direct and Substantial Financial Costs to the State, the Interest in Preserving Public Funds Does Not Support the Discrimination Against Poor Women Who Choose Abortions.

Pregnancy is a condition which, in this society, requires some form of medical treatment. The average cost of abortions performed during the first trimester, as 85% of them are, is $150. Abortions performed in the second trimester cost an average of $350.[13] By contrast, in 1973 Medicaid paid an average of $556 for a normal delivery in a public hospital and $798 in a private voluntary hospital. For the five percent of births delivered by Caesarean section, the average Medicaid payment was $1065 in public hospital.[14] Far from protecting the public fisc, the discriminatory poli-

[12] *Id.* at 41-47.

[13] H.E.W. Memorandum, "Effects of General Provision 431 of the Labor-H.E.W. Act," 120 *Cong. Rec.* 19, 678 (daily ed. Nov. 20, 1974).

[14] Jaffe, "Short-Term Costs and Benefits of United States Family Planning Programs," *Studies in Family Planning*, Vol. 5, No. 3, March 1974.

cies challenged here impose a substantial and direct financial cost to the state.

Connecticut, while maintaining that the major justification for its policy is to save public funds, recognizes that abortions cost less than delivery. But the state argues, "Connecticut is *presently* faced with a fiscal crisis and appears to be more concerned with the short-run aspects of its problem." [15] It is a very short run indeed which concerns the state. In the natural course of events it is nearly inevitable that the woman who, in consultation with her physician, seeks an abortion in one month and is denied, will return no more than nine months hence requiring far more costly delivery services.

An HEW study shows that "for each pregnancy among Medicaid-eligible women that is brought to term, it is estimated that the first-year cost to Federal, State and local governments for maternity and pediatric care and public assistance is approximately $2200." [16] The asserted interest in the preservation of public funds is, in this context, simply not credible. Rather, when the state denies payments to physicians who provide abortion services which both the physician and the woman believe are appropriate, it is shouldering a substantial additional burden on public welfare funds. In effect, the state's policy evidences a willingness to expend significant amounts of public funds for the purpose of denying poor women the right to choose, with their physicians, to have an abortion.

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[15] *Maher* v. *Roe, Brief of the Appellant, supra* n. 9 at p. 23.

[16] Memorandum From Deputy Assistant Secretary for Population Affairs, DHEW, to House-Senate Conference Committee on Labor-HEW Appropriations Bill (H.R. 14232), on Effects of Section 209, June 25, 1976.

Amici do not suggest that if the direct financial costs were other than they in fact are, then state discrimination in relation to the abortion choice could be justified. Legitimate concern for the public fisc does not justify conditioning public benefits on the sacrifice of fundamental constitutional liberty.[17] But the fact that the policies denying services to pregnant women who choose abortions produce substantial direct financial costs does emphasize the hollowness of Connecticut's alleged justification. To pass constitutional muster, another reason for the discriminatory classification must be demonstrated.

ii. Denying Poor Women Public Hospital Services or Medicaid for "Non-Therapeutic" Abortions Does Not Further a General State Interest in Providing Public Services Only for Medically "Necessary" Treatments.

Certainly it is a proper and legitimate state concern to limit the provision of publicly financed medical services to those treatments which are "necessary." In some sense, hospital treatment and physicians' services may not be strictly "necessary" for either childbirth or abortion. For most of human history, both childbirth and abortion were accomplished without either hospitalization or assistance from a physician. As recently as 1940, half of the childbirths in this country took place outside the hospital.[18] Of course, when more abortions and deliveries were performed

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[17] "A state may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . ." *Memorial Hospital* v. *Maricopa*, 415 U.S. 250, 263 (1974). *See also Shapiro* v. *Thompson, supra* at 633.

[18] *Health: United States, 1975*, p. 157 (Rockville, Maryland: U.S. Dept. of HEW, 1976). In 1973, 99% of all births took place in the hospital.

without hospital or physician services many more women died.[19]

It is not at all clear what Connecticut means when it asserts that some abortions are not "medically necessary." The requirement of "medical necessity" does not, in this context, screen out those treatments which can be obtained through self-treatment or from lay personnel. For most women the dangers inherent in undergoing delivery without hospitalization or assistance by a physician are significantly less than the dangers of undergoing a lay abortion. This Court has recognized that states have a legitimate interest in requiring that abortions be performed by qualified medical personnel.[20] While most states prohibit self-induced or lay abortions, states do not prohibit women from delivery at home, without physician assistance.[21] When the state argues that it denies abortion services because they are not "medically necessary," it does suggest that women should obtain the services from a lay practitioner. It is conceded that if abortions are to be done, they should be done by licensed physicians.

Another possible meaning of the term "medical necessity" is a requirement that the patient have a condition for which treatment is appropriate. Sometimes drugs or surgery are provided for conditions which further investi-

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[19] *Ibid.* In 1940 almost 9,000 women died in childbirth. In 1973 fewer than 500 women died.

[20] *Connecticut* v. *Menillo,* 423 U.S. 9 (1975). *See also Spears* v. *Circuit Court of the Ninth Judicial District,* 517 F.2d 360, 364 (5th Cir. 1975).

[21] In 1974 80% of the babies in the world were delivered by midwives. Sablosky, "The Power of Forceps: A Comparative Analysis of the Midwife—Historically and Today," 1 *Women and Health* 10 (1976).

gation would have revealed did not exist.[22] Certainly the state has a legitimate interest in attempting to assure that medical services will be provided with public funds only when the patient actually has the condition which the services are designed to treat.[23] The states can require procedures to assure that abortions are provided only to women who are actually pregnant.[24] But this is not what Connecticut and St. Louis mean when they invoke the term "medical necessity."

In Connecticut, to qualify for Medicaid reimbursement the physician must certify that the abortion is "therapeutic." Connecticut defines a therapeutic abortion as one recommended by both the woman's physician and the Chief of Obstetrics and Gynecology in an accredited hospital as "medically or psychiatrically necessary." Connecticut regulations require a prior authorization form, signed by these two physicians, including a "statement indicating the medical or psychiatric need for the abortion." After the operation, Connecticut requires a form which certifies that, in the opinion of the attending physician, the abortion "is medically necessary for the patient's health." The form must also be signed by the attending physician and attested

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[22] Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce (House of Representatives), *Cost and Quality of Health Care: Unnecessary Surgery* (U.S. Government Printing Office, Jan. 1976).

[23] *See Association of American Physicians and Surgeons* v. *Weinberger,* 395 F. Supp. 125 (N.D Ill. 1975), *aff'd* 96 S. Ct. 388 (1975) upholding the constitutionality of the federal PSRO program designed to assure that services provided to Medicare and Medicaid patients are medically necessary.

[24] *Planned Parenthood* v. *Fitzpatrick,* 401 F. Supp. 554, 574 (E.D. Pa. 1975) upheld the constitutionality of such a requirement.

to by the Chief of Obstetrics and Gynecology.[25] The City of St. Louis prohibits abortions in its public hospitals "for reasons other than to save the mother from grave physiological injury or death." *Doe* v. *Poelker*, 515 F.2d 541, 543 (8th Cir. 1975).

This Honorable Court in *Doe* v. *Bolton*, 410 U.S. 179 (1973), held that a Georgia statute was not impermissibly vague in allowing abortions to be performed only when a physician found that "based on his best clinical judgment that abortion was necessary." Following *United States* v. *Vuitch*, 402 U.S. 62, 71-72 (1971), this Court interpreted the requirement of medical necessity as encompassing "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient." 410 U.S. at 192. Connecticut now states that the "Physician's certification is not questioned by the Department of Social Services and the medical judgment of the physician is not subject to further review of any kind."[26]

With all due deference, while the assurance of this broad and liberal interpretation of the meaning of "medical necessity" is sufficient to protect a physician from the risk of criminal prosecution, the issues presented in the instant cases cannot be resolved by giving a liberal meaning to the term "medical necessity." First, it is apparent that neither Connecticut nor St. Louis intends such a broad and liberal meaning. The entire thrust of the policies in both jurisdictions is to limit abortions for the poor to those which are required because of the risk of severe physio-

[25] Connecticut Welfare Department, *Public Assistance Program Manual*, Vol. 3, Chap. III, Section 275.

[26] *Maher* v. *Roe, Brief of the Appellant, supra* n. 9 at 6.

logical and psychological consequences. Second, and more fundamentally, even if this Court is willing to give constitutional protection to the physician's freedom to determine that an abortion is "necessary" whenever failure to have an abortion would have profound adverse effects on a patient's general well being, many conscientious physicians are not able to characterize all such abortions as "medically necessary." With all due modesty, many physicians are not able to attach the label "medically *necessary*" to all those abortions which many women seek on the basis of a profound personal choice, and which the physician, in his best clinical judgment, deems medically *appropriate*. To most physicians, the concept of "medical necessity" implies a need arising from the likelihood of concrete physiological or acute psychological effects. The concept of "medical necessity" also implies an objective need for the treatment which exists independently of the personal and familial circumstances and choices of the patient.

When an older indigent woman seeks an abortion because she has more children than she can adequately care for, the physician may well recognize that the abortion is absolutely essential to the general well being of the woman and her family. Yet many physicians will not characterize that abortion as one which is "medically necessary" because the need does not arise from physiological or psychological factors which exist independent of the woman's judgment and choice. Or when a young woman seeks an abortion because she believes that she should finish high school, the physician may recognize that this abortion is essential to the patient's general well being, as well as the well being of the children which she may later bear. But again, many

physicians cannot and will not characterize that abortion as one which is "medically necessary."

As Mr. Justice Stevens recently noted, "the most significant consequences of the decision are not medical in character . . . Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life." *Planned Parenthood of Central Missouri* v. *Danforth,* 96 S. Ct. at 2856 (concurring in part, dissenting in part) (1976). While medical consultation is certainly necessary to inform a woman whether or not an abortion is medically appropriate, in most cases, either abortion or delivery will be medically appropriate, and medical care for one or the other will be medically necessary.

Both St. Louis and Connecticut have made plain that if a woman can carry a pregnancy to term without very serious risk to her life or physical health, then abortion is not necessary but "elective." It is important to note that "elective" in the context of abortion means something very different than it does in any other medical context. In other contexts, elective treatments are those for conditions which, if left untreated, may worsen and subsequently require treatment, or may stabilize, or may get better of their own accord. Medical science seldom knows with such precision of the consequences which will follow if an "elective" procedure is not performed. Once a woman is pregnant, it is absolutely certain that some medical treatment is necessary: either an abortion, treatment for a miscarriage, or delivery. Medical treatment itself is not elective but rather is necessary.

The specific policies challenged here are constitutionally prohibited under the principles enunciated by this Court in *Doe* v. *Bolton, supra.* They are prohibited because it is plain that no broad or liberal interpretation of the meaning of "medical necessity" is intended or implemented by the City of St. Louis or the State of Connecticut. The Connecticut policy is further prohibited because it requires the concurrence of a second physician, in direct contravention to the holding in *Doe* v. *Bolton.* Most fundamentally, these policies are constitutionally prohibited because they impinge upon the protected zone of privacy in which a woman and her physician may reach a decision whether, in her particular circumstances, an abortion is the most appropriate form of treatment. When the state imposes a requirement that the physician certify that abortions for the poor are not simply medically appropriate, but are necessary, the effect is to place the power of the state behind one answer to the question whether a particular indigent woman should have an abortion.. The effect is to create two classes of indigent pregnant women, and to penalize those who, with their physicians, determine that abortion is appropriate. In short, the effect is simply to deny indigent women the right of choice which this Court recognized and protected in *Roe* v. *Wade* and *Doe* v. *Bolton.*

iii. Policies Denying Public Medical Assistance for Abortion Have a Direct and Serious Adverse Impact on the Health of Women.

St. Louis asserts that one purpose of the discriminatory policy challenged here is to protect maternal health. The overwhelming evidence is that policies denying abortion services to the poor expose those women to substantially

increased risks of disability or death. When a woman is denied an abortion, one of three things will happen. Either she will carry the pregnancy to term and deliver, or she will persist and obtain a legal abortion after a period of unnecessary delay, or, in desperation, she will have an illegal abortion. Each alternative exacts large costs in terms of maternal mortality and morbidity.

In terms of immediate risks to the woman, childbirth is more dangerous than abortion. This Court observed in *Roe* v. *Wade,* 410 U.S. at 149, "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." More recent data confirm and underscore this Court's earlier conclusion.[27] For every age group, treatment of pregnancy by delivery creates substantially greater risks of mortality than treatment by early abortion. The disparity of risk is greatest among women between the ages of 40 and 44: they are almost seven times as likely to die in childbirth than they are from an abortion. The disparity of risk is least in women between the ages of 20 and 24. But even in this group the risk of death in childbirth is

[27] Abortions have been legal in New York since 1970. In New York City, from 1970-72, the death rate for first trimester abortions was 1.2 per 100,000. During the same period, the death rate for non-abortion, pregnancy related complications was 26.9 per 100,000 live births. Pakter *et al.*, "Impact of the Liberalized Abortion Law in New York City on Pregnancy Associated Deaths—A Two Year Experience." Paper presented at the Annual Meeting of the American Public Health Association in San Francisco (1973).

In 1973 the death rate for all kinds of abortions, including those in the second trimester, was 4.7 per 100,000 abortions. The death rate for deliveries alone, not including other kinds of pregnancy related deaths, was 10.0 per 100,000 live births. Bureau of Health Statistics and Analysis, New York City Department of Health (1974).

over four times as great as the risk of death from an induced abortion.[28]

When Medicaid and public hospital services are not available to provide abortions, many women will not have abortions. In many parts of the country it is still impossible to obtain an abortion. During 1974 and the first quarter of 1975, only 27% of the short term general hospitals in the United States performed abortions. Only 18% of the public hospitals would perform abortions.[29] If we assume that women in those areas of the country in which abortion services are not available would use those services at the same rate as women in those areas of the country where services are now available, then between thirty and fifty percent of the women who sought abortions in 1975 were not able to obtain them. In 1975 between 260,000 and 770,000 of the women who sought abortions were not able to obtain them.[30] Most of these women who were unable to obtain abortion services they sought are poor, teen-

[28] MORTALITY ASSOCIATED WITH PREGNANCY AND CHILDBIRTH AND INDUCED ABORTION

Age Group	Pregnancy and Childbirth*	Induced Abortion**
15–19	10.8	2.3
20–24	8.5	1.9
25–29	12.1	1.9
30–34	25.1	4.2
35–39	41.0	9.2
40–44	69.1	10.1

* Ratio per 100,000 births.
** Ratio per 100,000 first-trimester abortions.

Tietze, *et al.*, "Mortality Associated With the Control of Fertility," 8 *Family Planning Perspectives* 6, 7 (1976).

[29] Weinstock *et al.*, "Abortion Need and Services in the United States, 1974-75," 8 *Family Planning Perspectives* 58, 65 (1976). 1.6 percent of public hospitals do not offer services for either abortion or delivery. This case does not raise the question whether public hospitals have a general obligation to provide these services. See *supra* n. 6.

[30] *Id.* at 58.

agers and women living in rural areas.[31] "[B]etween 163,000 and 280,000 Medicaid-eligible women who need and want abortions are unable to obtain them, largely as a consequence of ambiguity in Medicaid policies and administrative practices." [32]

When the state erects bureaucratic and administrative barriers against those women who seek to exercise their constitutionally protected right to choose abortion, some women will travel to other states, and others will attempt to find the funds to allow them to purchase the abortion services from private providers. Delay is inevitable. Risks to maternal health increase quickly and dramatically. Second trimester abortions are far more dangerous than early abortions. The risk of complications is five times greater in a second trimester abortion and the mortality rate is nine times as high as that incident to a first trimester abortion.[33] An increase in second trimester abortions is a direct and inevitable result of denying women abortions in their own communities.

In 1974 over three out of every ten abortions performed in New York were performed on women who came from another state.[34] Connecticut was one of the leading states sending women to New York for abortions.[35] Among New

[31] *Ibid.*

[32] Jaffe, "Memo, Medicaid Financed Abortions," Alan Guttmacher Institute, N.Y. 1976.

[33] *See* Harris *et al.*, "Legal Abortion 1970-1971—The New York Experience," 63 *Am. J. of Pub. Health* 409, 415 (1973); Tietze *et al.*, "Mortality With Legal Abortion in New York City, 1970-72," 225 *JAMA* 507, 509 (1973).

[34] Pakter *et al.*, "Legal Abortion: A Half-Decade of Experience," 7 *Family Planning Perspectives* 248, 249 (1975).

[35] *Id.* at 249.

York City residents, 86% of the abortions were performed in the first trimester when the operation is safest. Only 74% of the non-residents obtained first trimester abortions. Women "who are thwarted by bureaucratic or other delays in their home communities (especially teenagers), account for an increasing proportion of those who travel to New York City for legal abortions." [36]

For many women, particularly indigent women, traveling to another part of the country to obtain abortion services is impossible. It is unfortunately foreseeable that some desperate indigent women will seek abortions from people other than qualified physicians. It is also known that such "kitchen table" operations pose a grave threat to maternal health and life. Although the number of deaths as a result of illegal abortions has decline dramatically since this Court's decision in 1973, illegal abortion has not disappeared. One recent study reports:

> proportionately more nonwhite than white women continue to die following illegal abortions. This may be a consequence of their generally lower socioeconomic status. Many of these women may have been unable to afford to go outside their localities to communities where safe, legal abortions were available and obtained more dangerous self-induced or other illegal procedures at home.[37]

[36] *Id.* at 250.

[37] Cates *et al.*, "Illegal Abortions in the United States: 1972-74," 8 *Family Planning Perspectives* 86, 91 (1976). Eighty percent of the women who died from illegal abortions in 1974 were non-white. *Id.* at 87, 88. *See also* Polgar *et al.*, "The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law," 8 *Family Planning Perspectives* 125 (1976).

For all these reasons, the state policy creating a distinction between those poor pregnant women who choose delivery and those who choose abortion cannot be justified on grounds of protecting maternal health. Indeed the overwhelming evidence is that a discriminatory policy of denying services to those women who seek abortion, while providing them to those women who seek delivery, exacts an appalling price in terms of the lives and health of women.

iv. Preservation of the Human Race Is Not a Legitimate Ground for Denying Poor Women Access to Abortions in the First Two Trimesters of Pregnancy.

The primary justification which the City of St. Louis offers in support of its policy restricting abortions in its public hospitals is an interest in the preservation of the human race, which, according to the City, begins prior to conception and continues "throughout the gestational cycle."[38] It is no longer open to the state to invade the private lives of its citizens to enforce policies requiring that every opportunity for conception and procreation be actualized. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe* v. *Wade*, *supra*; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*.

In *Roe* v. *Wade*, this Court recognized that the state does have a legitimate interest in the protection of potential human life. 410 U.S. at 150. However, that interest becomes sufficiently compelling as to justify state interference with abortion choice only at the point of viability.

[38] *Poelker* v. *Doe*, *Brief for the Petitioners*, *supra*, n. 10 at 39-40, 49-50.

410 U.S. at 163. The state's interests in this area do not become greater simply because the women involved are poor.

II.

The discriminatory policies denying public services to indigent women who choose abortion serve no secular purpose but rather only promote and establish a particular religious view in violation of the First and Fourteenth Amendments.

The human and financial costs of the policies restricting poor women's access to abortions are plainly enormous. What purpose do these policies serve? Petitioner John H. Poelker is quite candid about the purpose of the policy he has imposed on the St. Louis public hospitals. The lower court found that "the only reason advanced by the Mayor for his policy was his own personal conviction that abortion was tantamount to murder." *Doe* v. *Poelker*, *supra* at 545, n.6. In other states, restrictions on access to abortions for poor women have been defended on frankly religious grounds.[39] These policies restricting poor women's access to abortion represent an attempt by the state to dictate, with respect to poor women, an answer to the question on when human life begins. This Court in *Roe* v. *Wade*, 410 U.S. at 159, held that since the question is, in its nature,

[39] For example, the Commonwealth of Pennsylvania, in defense of a Medicaid abortion policy similar to Connecticut's, stated the issue as follows: "Millions of Pennsylvanians, both Catholic and non-Catholic, deeply believe that abortion is the equivalent of murder. Anti-abortionists bitterly resent the expenditure of their tax dollars to pay for abortions. The Department believes that in deference to the profound belief of these citizens [it must refuse payment for 'non-therapeutic' abortions]." Defendants' Memorandum in Support of Motion for Partial Summary Judgment, *Doe* v. *Wohlgemuth*, Civ. No. 73-1564 (E.D. Pa., filed July 12, 1973).

a religious one, it must be left to individual conscience.[40] The Constitution demands that the state maintain a position of neutrality.

The Establishment Clause of the First Amendment bars the state from using its power, authority and money to further the dogma of some religions, and from forcing the religious views of some citizens upon others whose beliefs are different. The settled decisions of this Honorable Court

> dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e.g., Epperson* v. *Arkansas,* 393 U.S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e.g., McGowan* v. *Maryland,* 366 U.S. 420 (1961); *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963), and third, must avoid excessive government entanglement with religion, *e.g. Walz* v. *Tax Comm'n,* 397 U.S. 664 (1970). *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973).

The discriminatory policies challenged here fail to pass muster on all counts.

The sole purpose of these policies is to throw the "prestige, power and influence of a public institution," *Walz* v. *Tax Comm'n,* 397 U.S. at 696, behind one religious position on the abortion question, and to force one religious judgment upon poor women. These policies serve no other purpose. In *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), this Court held that religious motivation, in and of itself, ren-

[40] *See* Tribe, "Forward: Toward a Model of Roles in the Due Process of Life and Law," 87 *Harv. L. Rev.* 1, 21 (1973).

dered invalid a state law which was indefensible on any non-religious grounds.[41] Similarly here, the religious motivation and lack of secular purpose could in and of themselves require the invalidation of the restrictions on abortions for poor women.

The sole effect of the abortion restrictions challenged here is to provide direct state subsidy to persuade poor women, vulnerable to financial pressure because of their indigency, to follow one religious dogma on the question of abortion, whatever the women's own personal or religious convictions and judgment. The effective aid which this policy affords one religious dogma is far more central and direct than the mixed and delayed benefits to religion which this Court has invalidated in other contexts. *See Committee for Public Education* v. *Nyquist, supra; Tilton* v. *Richardson,* 403 U.S. 672 (1971).

The concept of neutrality is at the very core of the First Amendment's Establishment and Free Exercise Clauses. *See, e.g., Engel* v. *Vitale,* 370 U.S. 421 (1962); *Walz* v. *Tax Comm'n,* 397 U.S. at 694-95 (Harlan, J., concurring). This requirement of state neutrality is also at the core of the Court's decision in *Roe* v. *Wade.* "The Establishment

[41] The case for the invalidation of the policies of Connecticut and St. Louis is more compelling than that presented in *Epperson* v. *Arkansas.* Not only are the discriminatory policies based on religious motivation, but, as we have seen, their sole effect is to aid one particular religious view by penalizing women whose beliefs are different. In *Epperson* the statute was invalidated solely because of improper purpose, since presumably the Court would not have struck down a rule eliminating biology from the curriculum for secular reasons, even though that would have had as much effect in aiding Fundamentalists as the elimination of the teaching of evolution. *See* Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 *Yale L.J.* 1205, 1318 (1970); Tribe, *supra* n. 40, at 22.

Clause forbids subtle departures from neutrality, 'religious gerrymanders' as well as obvious abuses." *Gillette* v. *United States,* 401 U.S. 437, 452 (1971). If the effect of a facially neutral policy is to favor one religious view over another, the government policy can be upheld only if neutral, secular principles can be found to justify the distinction, *Gillette* v. *United States,* 401 U.S. at 449. Since the effect here is to force on the poor a single religious dogma on the abortion issue, and to penalize poor women who would choose abortion rather than childbirth, all without any secular justification, these policies restricting access to abortion raise serious questions under the Establishment Clause.

A woman's choice whether or not to have an abortion of course raises inherently religious issues.[42] The plain command of this Court's decision in *Roe* v. *Wade,* 410 U.S. at 163, is that in the first two trimesters of pregnancy these moral questions must be left to private decision-making. Despite this Court's ruling that the moral aspects of the abortion decision are beyond the Constitutional power of the states, some organized religions have continued to press states to adopt and enforce policies reflecting their particular moral dogmas.[43] To discourage this destructive religious-political strife this Court should affirm the judg-

[42] Mr. Justice Harlan, concurring in *Walz* v. *Tax Commission,* 397 U.S. at 695, observed that "Religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws."

[43] Since this Court's 1973 abortion decisions the Family Life Division of the National Conference of Catholic Bishops and the U.S. Catholic Conference have conducted a massive nation-wide campaign promoting restrictive policies such as those held invalid by the courts below. *See Women's Lobby, Inc.* v. *McHugh,* C.A. No. 2025-73 (D.C. D.C. 1974).

ments of the courts below and reaffirm the principle that religious aspects of abortion decisions are issues upon which the law should take no stand."[44]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

Respectfully submitted,

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[44] *Epperson* v. *Arkansas,* 393 U.S. 97, 103-104 (1968); *Watson* v. *Jones,* 80 U.S. 679, 728 (1871):

> Prof. Paul Freund observed in "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680, 1692 (1969), "as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut,
Appellant,

vs.

SUSAN ROE, et al.,
Appellee.

On Appeal from the United States District Court for the District of Connecticut

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE~~

and

BRIEF OF JANE DOE, AMICUS CURIAE

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SUBJECT INDEX

	Page
Motion to File Brief Amicus Curiae	1
Brief of Amicus Curiae	4
I. Argument	4
A. The Medicaid Program	4
B. State Restrictions on Medicaid Payment for Abortion	5
C. The Meaning of "Medically Necessary"	6
D. Requiring a Physician's Certificate of Medical Necessity is Unconstitutional	10
II. Conclusion	13

TABLE OF AUTHORITIES

Cases

Beal v. Doe, No. 75-554 ..... 2, 3, 8, 9, 10, 13

Coe v. Hooker, 406 F. Supp. 1072 (D. N.H. 1976) 5, 8

Doe v. Bolton, 410 U.S. 179 (1973) 3, 6, 7, 8, 10, 11, 12

Doe v. Myatt, No. 430-74-48, D. N.Dak., Oct. 30, 1975 5

Doe v. O'Bannon, No. 4-74-Civ., D. Minn., August 1, 1975 5

Doe v. Rose, 499 F.2d 1112 (10th Cir. 1973) 5

Doe v. Westby, 383 F. Supp. 1143 (D. S.Dak. 1974), vacated and remanded, 420 U.S. 968 (1975), opinion on remand, 402 F. Supp. 140 (D. S.Dak. 1975) 2, 5, 11

Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974), aff'd sub nom Doe v. Beal, 523 F.2d 611 (3d Cir. 1975) 8

King v. Smith, 392 U.S. 309 (1968) 4

Klein v. Nassau County Med. Ctr., 347 F. Supp. 496, rev'd and remanded for consideration in light of Roe v. Wade and Doe v. Bolton, 412 U.S. 924, remand decision, 409 F. Supp. 731 (E.D. N.Y. 1976), appeal docketed sub nom Toia v. Klein, No. 75-1749 .....8, 13

Maher v. Roe, No. 75-1440 .....2, 3, 10, 13

Planned Parenthood Association v. Danforth, — U.S. —, 96 S.Ct. 2831 (1976) 8, 12, 13

Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), vacated and remanded, sub nom Beal v. Franklin, 44 U.S.L.W. 3758 5

Roe v. Ferguson, 389 F. Supp. 387 (S.D. Ohio 1974), rev'd 515 F.2d 279 (6th Cir. 1975) 8

Roe v. Norton, 408 F. Supp. 660, 663, Note 3 (D. Conn. 1975) 8

Roe v. Wade, 410 U.S. 113 (1973) 5, 7, 8, 9, 12

Smith v. Tinder, No. 75-0380CH, S.D. W.Va., Aug. 8, 1975 5

Toia v. Klein, No. 75-1749 .....3, 11, 12, 13

Townsend v. Swank, 404 U.S. 282 (1971) 4

Westby v. Doe, No. 75-813 .....1, 3, 11, 13

Statutes and Regulations

42 U.S.C. §600 4

42 U.S.C. §1380 4

42 U.S.C. §1396 .....4, 5, 6, 9

Missouri Revised Stat. §208.152 (12) (1973 Supp.) 5

Ohio Revised Code §5105.55(c) 5

Rule 280.210 of South Dakota Department of Social Services 5

Connecticut Welfare Department Public Assistance Program Manual, Vol. 3, Ch. III, §275 5

Louisiana Department of Public Welfare Memorandum No. 74-84 (June 17, 1974) 5

Secondary Authority

Bunker, "Elective Hysterectomy: Pro and Con," 295 New England Journal of Medicine 267 (1976) 8

Butler, "The Medicaid Program: Current Statutory Requirements and Judicial Interpretations," 8 Clearinghouse Review 7 (1974) 4

2 Family Planning/Population Reporter, pgs. 47-49, 80-81, 119 (1973) 5

3 Family Planning/Population Reporter at 34 (1974) ... 5

4 Family Planning/Population Reporter 113 (1975) 5

Stevens and Stevens, Welfare Medicine in America (1974) 4

Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, "Cost and Quality of Health Care: Unnecessary Surgery" (1976) .. 8

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF JANE DOE, AMICUS CURIAE

MOTION OF JANE DOE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

The National Health Law Program moves this Court for leave to file a brief amicus curiae in support of Appellee on behalf of Jane Doe and others similarly situated. Jane Doe is the named Plaintiff in *Westby v. Doe*, No. 75-813, on ap-

peal to this Court. She is a 28 year old resident of Pennington County, South Dakota, who receives Aid to Families with Dependent Children. The state officials who administer the South Dakota Medicaid Program refused to authorize payment for an abortion which she sought from her physician, resulting in litigation[1] of the same issues presented to this Court in *Beal v. Doe*, No. 75-554, and *Maher v. Roe*, No. 75-1440, the instant case.

The National Health Law Program is a national Legal Services Corporation-funded support center whose responsibilities include: researching legal aspects of health problems of the poor, developing legal techniques to remedy these problems and providing assistance to legal services attorneys throughout the country, such as those at Black Hills Legal Services, and their poverty clients who have difficulty obtaining high quality health care services. In this capacity Program attorneys have participated generally in litigation to obtain benefits for Medicaid recipients to which they are entitled under federal law and specifically in several of the Medicaid abortion cases which are pending in federal courts throughout the nation. Jane Doe, as a client of Black Hills Legal Services and the National Health Law Program, represents the interests of Medicaid eligible women in the many states which restrict payment for abortion under Medicaid.

Jane Doe requests leave to file this brief to bring the Court an issue which is not fully addressed by the records in *Beal v. Doe*, No. 75-554, and *Maher v. Roe*, No. 75-1440, the cases which the Court has chosen to hear on the Medicaid abortion question. Amicus supports and concurs in all of Appellees' and Respondents' arguments and further urges the Court to determine fully the issue of to what extent a state may refuse

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[1] *Doe v. Westby*, 383 F. Supp. 1143 (D. S.D. 1974), vacated and remanded, 420 U.S. 968 (1975); opinion on remand, 402 F. Supp. 140 (D. S.D. 1975), appeal docketed Dec 8, 1975, No. 75-813.

to pay under its Medicaid program for any abortions which the state deems not "medically necessary" or "medically indicated." The state's position in *Maher* is similar to that advanced by the Solicitor General in his brief in support of Pennsylvania's petition for certiorari in *Beal v. Doe*, that a certificate of medical necessity may be required within the constraints of *Doe v. Bolton*, 410 U.S. 179 (1973). The records in *Beal* and *Maher* do not reveal the effects of a certificate such as the Solicitor proposes, but the trial records in *Westby v. Doe*, No. 75-813, and *Toia v. Klein*, No. 75-1749, demonstrate the serious problems which the requirement of a certificate would present. Because the limits of the definition of medical necessity for purposes of Medicaid payment for abortion are at issue in several other federal district court cases, amicus urges this Court to resolve finally and completely the medical necessity question, which has caused physicians, state administrators and Medicaid recipients considerable confusion concerning the term "medically necessary" that has unduly interfered with Medicaid eligible women's right to obtain medical treatment from competent, ethical medical practitioners.

Appellant and Appellee have consented to the filing of this brief. See Appendix herein.

BRIEF OF JANE DOE, AMICUS CURIAE

I. ARGUMENT

A. The Medicaid Program.

Funded jointly by the state and federal governments, the federal program of medical assistance for the indigent, "Medicaid", is a state-administered program which pays for the costs of medical care for most welfare recipients and certain other poor individuals.[2] 42 U.S.C. § 1396 *et seq*. States are not required to participate in Medicaid, but if they choose to do so, they must comply with the federal statutes and regulations which outline general program parameters. *Townsend v. Swank*, 404 U.S. 282 (1971), *King v. Smith*, 392 U.S. 309 (1968). Participating states must establish state plans which detail the groups of persons covered, types of services offered and conditions which providers of health care under the program must meet.

Federal law requires states to provide to recipients of the federal welfare programs (AFDC, 42 U.S.C. § 600 *et seq*., and SSI, 42 U.S.C. § 1380 *et seq*.), the "categorically needy," at least seven basic services: physician services, X-ray and laboratory services, inpatient hospital services, outpatient hospital services, nursing home services, family planning services and early childhood health screening. 42 U.S.C. §§ 1396a(a)(10), (13)(B) and 1396d(a)(1)-(15). Just over half of the states also cover under Medicaid other poor persons who have too much income or resources to qualify for welfare, but who cannot afford health care and who are aged, blind or disabled or

[2] *See* generally, Butler, "The Medicaid Program: Current Statutory Requirements and Judicial Interpretations," 8 *Clearinghouse Review* 7 (1974), Stevens & Stevens, *Welfare Medicine in America* (1974).

dependent children within the meaning of federal law, the "medically needy", 42 U.S.C. § 1396a(10)(C). States covering the medically needy must provide either the basic seven services listed above or seven of the sixteen services listed in the Medicaid law, including some institutional and some non-institutional services, 42 U.S.C. § 1396d(a)(1)-(16). States may also provide virtually any other medical services such as drugs, eyeglasses or dental care, from this statutory list of optional services.

B. State Restrictions on Medicaid Payment for Abortion.

In response to this Court's 1973 *Roe v. Wade* and *Doe v. Bolton* decisions, 410 U.S. 113, 179, most states have repealed their plainly unconstitutional criminal prohibitions on abortions.[3] But many states have adopted laws which limit access to abortion by prohibiting Medicaid payment for abortion or requiring that abortions be "therapeutic", "medically indicated" or "medically necessary",[4] terms which are usually defined to be "a threat to the woman's life or health."

[3] *See, e.g.*, 2 *Family Planning/Population Reporter* 47-49, 80-81, 119 (1973).

[4] *See, e.g., Id.*, 3 *Family Planning/Population Reporter* 34 (1974); 4 *Family Planning/Population Reporter* 113 (1975); Rule 280.210, South Dakota Dept of Soc. Serv., *Doe v. Westby*, 383 F. Supp. 1143, 1145 (D. S.D. 1974); Conn. Welf. Dept. Pub. Ass. Prog. Manual, vol 3, Ch. III, §275; Mo. Rev. Stat. §208.152(12) (1973 Supp.); La. Dept. Pub. Welf. Memo No. 74-84 (June 17, 1974); Ohio Rev. Code §5105.55(c). New Hampshire Regulations, *see Coe v. Hooker*, 406 F. Supp. 1072, 1076 (D. N.H. 1976); Utah policy, *see Doe v. Rose*, 499 F. 2d 1112, 1113 (10th Cir. 1973); Pennsylvania statute, *see Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 554, 578 (E.D. Pa. 1975); Minnesota regulations, *see Doe v. O'Bannon*, No. 4-74-Civ., D. Minn. Aug. 1, 1975; North Dakota regulations, *see Doe v. Myatt*, No. 43-74-48, D. N. Dak. Oct. 30, 1975; West Virginia regulations, *see Smith v. Tinder*, No. 75-0380CH, S.D. W. Va., Aug. 8, 1975.

With no attention to constitutional constraints, many states justify such restrictions on the ground that the federal Medicaid law authorizes payment of federal funds for only services that are medically necessary, since the preamble to the Medicaid Act describes the principal object of the program to be paying for

> "medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396.

Another provision of the Act permits states to set "reasonable standards . . . for . . . the extent of medical assistance available under the program," 42 U.S.C. § 1396a(a)(17). This Court addressed the meaning of the term medically necessary in *Bolton*, where it was a corollary issue, and its language there does provide the foundation for resolving the confusion which surrounds the term. It will be seen that in the context of family planning decisions, the term "medically necessary" is constitutionally devoid of meaning. It is a red herring issue which states have used to camouflage their philosophical opposition to abortion.

C. **The Meaning of "Medically Necessary."**

The state of Connecticut's position in this case is that the Constitution permits states to distinguish between "necessary" and "unnecessary" abortions because it imposes this requirement upon payment for other Medicaid services. (Appellants' Brief at 7, 12). However, by defining medical necessity narrowly to mean only "medically or psychiatrically indicated" (brief at 4), the state ignores the Court's decision in *Bolton* that the term must include social, emotional, psychological and familial factors. Although the state maintains that the physician's certification of medical necessity "is never challenged" (brief at 4),

since the state's definition of medical necessity is unconstitutionally narrow, the physician certification requirement impermissibly infringes upon the physician/patient relationship by limiting the physician's ability to act in the patient's best interest. The state's position also ignores the fact that the question of medical necessity arises when pregnancy is diagnosed, not when the physician and patient choose the treatment for pregnancy. The Court thus must reject the state's argument on medical necessity.

This Court faced the issue of what constitutes a medically necessary abortion in *Doe v. Bolton*, when it upheld a section of the Georgia statute which makes it illegal for a physician to perform an abortion unless it is "necessary" based on "his best clinical judgment," 410 U.S. at 192-93. The Court assumed expressly that the physician would make a decision to abort based on physical, emotional, psychological and familial factors as well as the woman's age. *Id.* By adopting this analysis, the Court seems to have accepted the proposition that there are "medically unnecessary" abortions, apparently those where the patient is not actually pregnant or where the above-listed factors are absent and the physician acts contrary to the patient's best interests. These comments are apparently the source of some of the confusion on the medical necessity issue.

Underlying the Court's determination in *Bolton* and *Wade* that the right to privacy includes the abortion choice, 410 U.S. at 155-63, 198-99, is the unspoken assumption that pregnancy is a condition that requires medical treatment. Two alternative choices of treatment are abortion and prenatal care plus delivery. It is this choice of treatment for the acknowledged medical condition which states have restricted and which the Court decided was protected by the constitutional right to privacy. However, the underlying condition of pregnancy, not the choice of treatment, determines whether medical attention is "necessary".

A generally accepted definition of medical necessity is that care which is responsive to the problem for which it is being offered.[5] To apply this definition to any procedure requires that one first identify the condition or diagnosis for which the medical care is being offered and then determine whether the care is safe and efficacious for the condition. Pregnancy is a condition which is universally recognized in our modern society to require medical attention, although it is not an illness or disease and although it may be voluntary.[6] Therefore, once verifying that a patient is pregnant, to decide whether or not an abortion is necessary only requires determining whether it is a safe and efficacious response at certain medically recognized stages of pregnancy. Obviously abortion is such a response. Whether it is the appropriate choice for an individual woman is governed by the considerations enumerated by the Court in *Bolton* and is protected by the right to privacy.[7] Neither the choice of abortion nor that of medical care and delivery can be considered "unnecessary" despite the existence of an alternative form of

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[5] For an application of this definition, see Bunker, "Elective Hysterectomy: Pro and Con," 295 *New England Journal of Medicine* 267 (1976); *cf.* Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, "Cost and Quality of Health Care: Unnecessary Surgery" (Jan. 1976).

[6] *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500-01 *rev'd and remanded for reconsideration in light of Wade and Bolton*, 412 U.S. 924; remand decision, 409 F. Supp. 731 (E.D.N.Y. 1976); *Roe v. Ferguson*, 389 F. Supp. 387, 392 (S.D. Ohio 1974), *rev'd on other grounds*, 515 F. 2d 279 (6th Cir. 1975); *Doe v. Wohlgemuth*, 376 F. Supp. 173, 190 (W.D. Pa. 1974), *aff'd sub nom Doe v. Beal*, 523 F. 2d 611, 620-22 (3d Cir. 1975); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83 (D. N.H. 1976). *Cf. Roe v. Norton*, 408 F. Supp. 660, 663, note 3 (D. Conn. 1975).

[7] This Court's recent pronouncement on the extent of the right to choose abortion appears to indicate that the woman's interest in her health underlies the right to privacy. *Planned Parenthood v. Danforth*, — U.S. —, 96 S.Ct. 2831, 2840 (1976). However, the dissenting Justices, White, Burger and Rehnquist, correctly recognized that the right to choose abortion in *Wade* derives from the woman's interest in the effect of pregnancy upon her *life*. *Id.* at 2851-2852.

medical intervention, and despite the fact that those treatments appear to present different outcomes—a child or no child. Most forms of treatment for a given condition are designed to produce the same result, which may be why there is such reluctance to understand the foregoing analysis of the problem. However, viewed as medical care for the woman patient, both abortion and prenatal care plus delivery do produce the same result—a safe termination of the pregnant condition.

Under the postulated analysis, and consistent with the Constitution, a state may generally limit services for which it pays under Medicaid services in three ways: First, it may obviously limit services for which it pays under Medicaid to those which are safe and efficacious, *e.g.*, 42 U.S.C. § 1396a (a)(30), 45 C.F.R. §§ 250.18, 250.19. To do so is "in the best interests of the recipients," 42 U.S.C. § 1396a(a)(19). The Court recognized in *Wade* that with respect to abortions, this important state interest begins in the second trimester of pregnancy, 410 U.S. at 163, and permits a state to limit the facilities where abortions are performed, *Id.*

Second, under the discretion provided in the Medicaid statute, 42 U.S.C. §1396a(a)(10)(B), *Doe v. Beal*, 523 F.2d at 616 (3d Cir. 1975), a state may limit the *conditions* for which treatment will be provided at all, 523 F.2d at 620-21. Thus conditions which do not require medical attention, such as the shape of a nose, may be excluded from Medicaid treatment.

Finally, it is also possible that a state may limit a physician's choice of treatment for some conditions. It could, for example, refuse to pay for cosmetic surgery, which might be a physician's preferred choice of treatment for an emotional condition which a state might otherwise cover. *Doe v. Beal*, 523 F. 2d at 620. However, when the condition is pregnancy, this Court has declared that the physician and patient's *choice* of treatment is protected by the Constitution from state interference absolutely during the first trimester, and that during the

second trimester the state may only regulate the choice to protect the woman's health. 410 U.S. at 153-56. Therefore, regardless of whether a state may limit choice of treatment for some conditions, the Constitution prohibits it from imposing any choice of treatment for pregnancy.

The Solicitor General's brief suggests a compromise position which has dangerous appeal because its impact was not explored or tested in the trial courts in *Beal* or *Maher*. The federal government argues that physicians may be required to certify that abortions are "medically necessary" as the term is defined in *Bolton*, but that the state may not look behind the certification once it is made. Solicitor General's Brief at note 5, pp. 7-8. This position is distinguished from the state's position herein that it may require a physician's certificate of medical or psychiatric necessity which it does not question, but which does *not* expressly include the factors described in *Bolton* to be included in the term. As amicus will demonstrate, such a requirement as the Solicitor General suggests would significantly impair the physician's and patient's constitutionally protected right to choose the appropriate treatment for pregnancy.

D. **Requiring a Physician's Certificate of Medical Necessity Is Unconstitutional.**

The Court's discussion in *Bolton* suggests that a state may require a physician to certify that an abortion is "necessary", as that term is defined to include physical, emotional, psychological and familial factors. Yet the Court's opinion also suggests that a state may not challenge such a certificate of medical necessity, because the physician is presumed to consider those factors and act in the patient's best interest. Failure to do so is punishable by discipline of the state licensing boards. 410 U.S. at 200.

Several states do require that physicians certify that an abortion is "medically necessary" in order to be paid for performing the procedure for Medicaid eligible women.[8] The Solicitor General's brief approves this policy on the grounds that abortion requires the "exercise of medical judgment," Solicitor's brief at 7, and should "be the product of a medical determination," Solicitor's brief at 8. These remarks miss the thrust of the Court's express assumption in *Bolton* that physicians *do* make medical determinations and exercise medical judgment in advising patients about the choice of pregnancy treatment. In a footnote, the Solicitor General's brief does acknowledge that physicians should consider physical, emotional, psychological, familial factors and the woman's age, note 5, yet his subsequent arguments are inconsistent with this assumption.

Thus the Solicitor's brief begs the real question of the meaning of "medically necessary;" it argues for requiring physicians to execute a certification, but presumes (contrary to the state's position herein) that they will consider in their decisions all the factors which the Court declared in *Bolton* to be included in the term. Requiring a certificate which is presumed to derive from these factors and which a state may not challenge might seem to be a meaningless but harmless mandate. However, as the records in *Westby v. Doe* and *Toia v. Klein* demonstrate, such a requirement is confusing to administrators and physicians alike.

Some physicians, such as Jane Doe's physician in the *Westby* case, have their own definition of when a procedure is medically necessary, usually when a procedure is compelled by a threat to life or health. Yet they may prefer to apply a different standard to determine whether an abortion is in their patient's best interest. (Deposition of H. Benjamin Munson, M.D. in *Doe v. Westby*[9]) Requiring physicians to certify that an abortion is

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[8] *Supra* note 3.

[9] When asked for his definition of "medically necessary" Dr. Munson replied:

> Well, I would say a "necessary medical procedure"—I hardly ever use the word. I would say advisable, beneficial. Anything

medically necessary when that term is capable of several meanings has been demonstrated to inhibit physicians from performing abortions for Medicaid patients because they fear that the certificate may in fact be challenged or because they do not understand the term. *See, e.g.* Appellee's Motion to Affirm, *Toia v. Klein*, No. 75-1749, at 6-8.

Permitting states to impose this meaningless precondition of a certificate of medical necessity upon Medicaid abortion payment will continue to impair the physician-patient relationship and the physician's ability to prescribe the treatment of choice, both of which were guaranteed protection in *Bolton* and *Wade*. The requirement is thus quite pernicious and must be eliminated.

Other measures exist by which states can protect against the only types of "unnecessary" abortions which the Court implicitly recognized in *Bolton*: Those where the patient is not actually pregnant or where the physician acts contrary to the patient's express will or her informed judgment. To avert the problem of "abortional" acts upon women who are—negligently or intentionally—misdiagnosed as pregnant, states can and do license clinics, laboratories and physicians. To assure that the patient has freely participated in and concurs with the physician's decision, a state may require a written consent form, as this Court recognized last term in *Planned Parenthood Associa-*

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that's necessary, without which a person will die, of course that's necessary. Anything without which a person will suffer a serious embarrassment of health, I think that could be called necessary. Beyond that, I suppose very few things are really necessary. (Deposition of H. Benjamin Munson, M.D., June 7, 1974, at 13).

With respect to the "necessity" of an abortion for Jane Doe, his patient, Dr. Munson said:

> I think "necessary" is too strong of a word. No. I wouldn't say necessary, except in terms of preserving the reasonable health that she had, preserving it from depletion and overtiredness and the kind of things that would prejudice a person's general vitality. (*Id.* at 17.)

tion v. Danforth, — U.S. —, 96 S. Ct. 2831. 2839-2840 (June 29, 1976). By adopting these safeguards, a state can protect its legitimate interest that funds are not used to pay for fraudulent procedures or those where the woman does not consent to treatment.

II. CONCLUSION

The requirement that abortions be certified as medically necessary before they are eligible for Medicaid payment is unconstitutional because pregnancy has been acknowledged to be a condition requiring medical attention and the choice of how to terminate pregnancy—whether by abortion or delivery—has been held to be constitutionally protected from state interference until the point of fetal viability. The medical necessity question is answered once a state determines that a condition requires medical intervention or, at least, once a state determines that it will cover such conditions under its Medicaid plan. The term medical necessity has only a limited meaning in the context of pregnancy—to assure that pregnancy exists. The state may also assure that the woman concurs in the treatment decision. A certificate that an abortion is "medically necessary" is therefore meaningless, and might be innocuous were it not for the fact that imposing this meaningless and formalistic requirement has actually inhibited physicians from performing abortions upon consenting women for whom the physicians felt the procedure was in their best interest, as demonstrated by the record in *Toia v. Klein*.

Amicus urges the Court squarely to confront and dispose of this issue, although it is only indirectly raised by the parties in *Maher*, in order to avoid the necessity of further proceedings in *Westby*, *Klein* and other cases where the states' requirement inhibits the constitutionally protected interests of the physician

and patient to choose the most appropriate course of treatment for pregnancy.

Respectfully submitted,

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APPENDIX

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Message

Patricia A. Butler
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Los Angeles, CA 90024

9/15/76

Dear Ms. Butler:

Please be advised that the plaintiff-appellees do not object to your filing an amicus curiae brief in Maher v. Roe, No. 75-1440, and we welcome your participation.

Very truly yours

/s/ Lucy V. Katz

State of Connecticut

Carl R. Ajello
Attorney General

Reply to:
566-7014

Office of the Attorney General
90 Brainard Road
Hartford 06114

13 September 1976

Patricia A. Butler
Attorney at Law
National Health Law Program
10995 Le Conte Avenue, Room 640
Los Angeles, California 90024

Dear Ms. Butler:

In reply to your letter dated September 7, 1976, I have no objection to your filing an *amicus* brief in support of the appellees in *Maher v. Roe*, No. 75-1440, *provided* that the participation of your organization as a federally funded Legal Services Corporation, in an abortion case, is not contrary to any federal law prohibiting such activity.

Very truly yours,

Carl R. Ajello
Attorney General
By Edmund C. Walsh
Assistant Attorney General

ECW:lp

cc: Lucy Katz, Attorney at Law

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